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Investigation
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MEMORANDUM TO: James J. Jochum
Assistant Secretary
for Import Administration

FROM: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty
Investigation of Certain Frozen and Canned Warmwater Shrimp from
Brazil

Summary

We have analyzed the comments of the interested parties in the antidumping duty investigation of certain frozen and canned warmwater shrimp from Brazil. As a result of our analysis of the comments received from interested parties, we have made changes in the rates assigned to two of the three respondents in this case, Central de Industrializacao e Distribuicao de Alimentos Ltda. (CIDA) and Empresa de Armazenagem Frigorifica Ltda. (EMPAF). We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this investigation for which we received comments from parties.

General Comments

Comment 1 Offsets for Non-Dumped Sales
Comment 2 Calculation of the "All Others" Rate

Company-Specific Comments

CIDA

Comment 3 Billing Adjustments
Comment 4 Insurance Payments as an Offset to General and Administrative Expenses
Comment 5 Collapsing CIDA with its Affiliated Processor
Comment 6 Cost Allocation Methodology
Comment 7 Ration and Larva Costs

- Comment 8 Loss on Sale of Fixed Assets*
- Comment 9 ICMS Taxes*
- Comment 10 Change in Raw Shrimp Inventory*
- Comment 11 Prompt Payment Discounts*

EMPAF

- Comment 12 Presumed Credit and IPI Export Credit Premium Revenues*
- Comment 13 Brazilian Indirect Selling Expenses*
- Comment 14 U.S. Indirect Selling Expenses*
- Comment 15 Container Weight*
- Comment 16 SPECIES Product Characteristic*
- Comment 17 Accounting Errors Prior to the Cost Accounting Period*
- Comment 18 Double Counting Indirect Selling Expense*
- Comment 19 Amortization of Pre-Operational Costs*
- Comment 20 Allocation of Depreciation to Work-in-Process Inventory*
- Comment 21 Other Adjustments to Shrimp Costs*

Norte Pesca S.A. (Norte Pesca)

- Comment 22 Adverse Facts Available Rate for Norte Pesca*

Background

On August 4, 2004, the Department of Commerce (the Department) published the preliminary determination in the less-than-fair-value investigation of certain frozen and canned warmwater shrimp from Brazil. See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp from Brazil, 69 FR 47081 (Preliminary Determination). We amended the preliminary determination on August 30, 2004, to correct certain ministerial errors in our margin calculations for EMPAF that we considered to be significant under 19 C.F.R. 351.224(g). See Notice of Amended Preliminary Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from Brazil, 69 FR 52860. The products covered by this investigation are certain frozen and canned warmwater shrimp. The period of investigation (POI) is October 1, 2002, through September 30, 2003.

We invited parties to comment on our preliminary determination. We received comments from the petitioners (i.e., the Ad Hoc Shrimp Trade Action Committee, Versaggi Shrimp Corporation, and Indian Ridge Shrimp Company), CIDA, EMPAF, and the Association of Brazilian Shrimp Farmers

(ABCC), Eastern Fish Company, Inc., and Long John Silver's, Inc.¹, interested parties in this investigation. Based on our analysis of the comments received, as well as our findings at verification, we have changed the weighted-average margins from those presented in the preliminary determination.

Margin Calculations

We calculated export price (EP), constructed export price (CEP), and normal value (NV) using the same methodology stated in the preliminary determination, except as follows:

CIDA

1. We used the revised cost of production (COP) database CIDA submitted on November 12, 2004 (CIDACOP05), and merged it with the home market database by the "as sold" control number variable, CONNUM2.
2. We revised courier expenses (reported as direct selling expenses) for one invoice based on verification findings.
3. We revised packing expenses based on verification findings.
4. We added an additional payment date for two invoices.
5. We recalculated imputed credit and inventory carrying costs, using the interest rate we found to be correct at verification.
6. We deducted demurrage expenses from EP and NV for certain sales, based on verification findings.
7. We used the product-specific raw shrimp costs reported by CIDA in attachment 10 of its June 28, 2004, section D response that were developed based on prices published by Uner Barry Publications, Inc. (Uner Barry) (Uner Barry is a publicly available source of worldwide shrimp prices). See Comment 6.
8. We revised the product-specific variable and fixed manufacturing overhead costs by using the production quantity as the allocation base. See Comment 6.
9. We revised the reported general and administrative (G&A) expense ratio to include the gain on the sale of other fixed assets, and excluded the insurance reimbursement that was related to a shrimp export accident prior to the POI and also to fiscal year (FY) 2003. See Comments 4 and 8.
10. We revised the reported tax expense ratio to exclude the claimed ICMS credit in the COP calculation. See Comment 9.
11. We treated CIDA and its affiliated processor, Cia Exportadora de Produtos do Mar (Produmar), as one entity, assigning a single antidumping margin to the CIDA/Produmar entity. See Comment 5.

¹The briefs submitted by Eastern Fish Company, Inc. and Long John Silver's, Inc. related only to scope issues.

See Memorandum to The File from Rebecca Trainor, CIDA - Calculation Memorandum for the Final Determination, dated December 17, 2004 (CIDA Sales Calculation Memorandum), and Memorandum to Neal M. Halper from Sheikh Hannan, CIDA Cost of Production and Constructed Value Calculation Adjustments for the Final Determination, dated December 17, 2004 (CIDA Cost Calculation Memorandum), for additional discussion of the above-referenced changes to the margin calculations.

EMPAF

1. We relied on the revised sales and cost databases submitted by EMPAF on November 15, 2004, which incorporated verification revisions and corrections. For a listing of the revisions made to the databases, see the October 28, 2004, letter from the Department to Christopher S. Stokes of Hogan & Hartson L.L.P., counsel for EMPAF, requesting revision of certain items in its databases.
2. We deducted commissions from U.S. price, in accordance with verification findings and 19 C.F.R. 351.410(c).
3. We adjusted the reported shrimp costs to include the change in inventories with third parties, the year-end physical inventory adjustment to raw materials and work-in-process inventories, and for the unreconciled difference between EMPAF's accounting system and the costs reported to the Department. See Comments 17 and 21.

See Memorandum to The File from Katherine Johnson, EMPAF Calculation Memorandum for the Final Determination, dated December 17, 2004 (EMPAF Sales Calculation Memorandum), and Memorandum to Neal M. Halper from Michael Harrison, EMPAF Cost of Production and Constructed Value Calculation Adjustments for the Final Determination, dated December 17, 2004 (EMPAF Cost Calculation Memorandum), for additional discussion of the above-referenced changes to the margin calculations for EMPAF.

Discussion of the Issues

I. General Issues

Comment 1: *Offsets for Non-Dumped Sales*

In calculating the overall weighted-average dumping margins for purposes of the preliminary determination, the Department did not use non-dumped sales comparisons to offset or reduce the dumping found on other sales comparisons, consistent with our normal practice.

EMPAF argues that the WTO has ruled against the Department's practice of assigning a zero dumping margin to CONNUMs sold in the United States above NV. EMPAF cites the case of Alexander Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch.) 64, 118 (1804) (Charming Betsy) to support its claim that the Department must, to the extent possible, interpret and apply the U.S. antidumping laws

in a manner that does not conflict with its international obligations, including obligations under the WTO Antidumping Agreement.

EMPAF claims that two things are clear in this case. First, the Department is not directed by any provision of U.S. law to ignore non-dumped sales comparisons as an offset to or reduction in the dumping found on other sales comparisons and therefore does so purely as a matter of interpretation. Second, the WTO Antidumping Agreement does not permit this methodology as applied by the Department. Therefore, as a matter of U.S. law under the Charming Betsy doctrine, the Department should not allow this offset in its calculation of overall dumping margins.

EMPAF also argues that the Court of International Trade (CIT) has repeatedly ruled that the statute is at best silent on this question. EMPAF cites Bows Passant Reinigungs-Und Waschereitechnik GmbH v. United States, 926 F. Supp. 1138 (May 8, 1996), and Serampore Industries PVT. Ltd. v. United States, 675 F. Supp. 1353 (CIT 1987), among other cases, in support of its position. In addition, EMPAF asserts that in the recent Court of Appeals for the Federal Circuit (Federal Circuit) decision, Timken Co. v. United States, 354 F. 3d 1334, 1340-42 (Fed. Cir. 2004) (Timken), the court clearly and unequivocally stated that the statute does not require this practice. EMPAF argues that these cases demonstrate that the Department's position that its practice is required by the statute is simply wrong.

EMPAF further argues that although the CIT and Federal Circuit have previously found that the Department's interpretation of the antidumping statute is ordinarily to be accorded deference under Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc. (467 U.S. 837 (1984)), such deference is not appropriate when the Department's interpretation is inconsistent with U.S. international obligations. EMPAF cites Hyundai Electronics Co., Ltd. v. United States, 53 F. Supp. 2d 1334 (CIT 1999) in support of its position. EMPAF then concludes that it is clear from the WTO Appellate Body decisions in European Communities- Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/AB/R (March 1, 2001) (EC-Bed Linen) and United States-Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R (August 11, 2004) (US-Softwood Lumber) that the Department's interpretive "gap-filling" cannot be squared with international law as embodied in the WTO Antidumping Agreement. EMPAF claims that while the Department has avoided confronting this problem in past cases by asserting that it was not a principal party to, and therefore not bound by, the EC-Bed Linen determination, the Department is no longer able to make this claim since the United States was a direct party to the US-Softwood Lumber dispute, and is bound by its results. Furthermore, EMPAF argues that even though the methodology was challenged "as applied", rather than "as such," in US-Softwood Lumber it is clear that this technical distinction has no substantive meaning.

In conclusion, EMPAF maintains that because the Department's current practice is not required by the U.S. antidumping statute, there is no direct conflict between U.S. and international law. Further, EMPAF claims that under the Charming Betsy doctrine the U.S. antidumping statute must, to the extent possible, be interpreted in a manner consistent with the WTO Antidumping Agreement. Accordingly, EMPAF argues that the Department should refrain from applying its current methodology for the final

determination of this investigation in order to maintain consistency with the United States' obligations under the WTO Antidumping Agreement.

CIDA concurs with EMPAF that the Department's practice is contrary to recent WTO findings. Citing the US-Softwood Lumber case, CIDA argues that the Appellate Body has ruled the practice to be inconsistent with U.S. WTO obligations. Therefore, the Department should recalculate CIDA's dumping margin for the final determination without ignoring non-dumped sales comparisons as an offset to dumping found on other sales comparisons.

The ABCC argues that the Department's practice results in the imposition of weighted-average dumping margins in cases where, but for the policy, those margins would either be lower or *de minimis*. ABCC cites Corus Staal BV v. United States, 259 F. Supp. 2d 1253, 1260, n.8 (CIT 2003) (Corus), where the Department conceded that, without this practice, a particular respondent's dumping margin would have been negative and the investigation would have been terminated. ABCC claims that although some U.S. courts have said that the Department's policy is legal, the WTO has said it is not.

ABCC states that the Federal Circuit recognized in Timken that the relevant statutory provision is ambiguous. The appropriate question then, according to ABCC, is whether the Department's practice is based on a permissible construction or interpretation of the statute. According to ABCC, as a matter of law and policy, the Department and the reviewing courts must not be so reluctant to examine, and to upset if necessary, the Department's self-described regulatory authority when it collides with international law. ABCC recognizes, however, that U.S. courts have held that WTO decisions are not automatically binding upon the Department or the courts. See Corus. ABCC argues that while this means that the issue must be re-litigated in every subsequent case, it does not mean, nor cannot mean, that the Department and U.S. courts may disregard prior WTO decisions in determining whether and to what extent international law must be applied to resolve a question of statutory interpretation of U.S. legislation implementing the WTO Antidumping Code. ABCC argues that a WTO decision is part of international law even if it is not automatically dispositive of all future cases raising the same or similar issues. Therefore, the Department must refrain from failing to include non-dumped sales comparisons as an offset or reduction in dumping found on other sales comparisons in its final determination.

The petitioners argue that the Department's practice is a reasonable application of the statute, pointing out that CIDA, EMPAF, and ABCC do not appear to seriously argue that the Department abandon the law and agency practice, but rather use their case briefs to express their opposition to this methodology generally. The petitioners state that the CIT has once again reiterated, "WTO decisions are not binding on this Court nor on Commerce." See SNR Roulements v. United States, Slip Op. 04-100 at 14 (CIT August 10, 2004). See also NSK Ltd. v. United States, Slip Op. 2004-105 at 16 n.8 (CIT August 20, 2004) ("While WTO adjudicatory decisions may be persuasive, they are not binding on Commerce or this court."). The petitioners also contend that federal courts have recognized that the report of a WTO dispute settlement body is not even binding on future WTO dispute settlement cases, as these reports "do not have the *stare decisis* effects of common law." See NSK Ltd. v. United States, Slip. Op. 2004-105 at 16 n.8. The petitioners add that the CIT's ruling in Corus established

that the Department's practice is a reasonable application of the statute, and claim that the court's decision is consistent with the rulings of every federal court that has reviewed the practice.

The petitioners further argue that U.S. law forbids any change in an agency practice as a result of an adverse WTO Panel or Appellate Body decision until certain actions take place—i.e., consultations between the United States Trade Representative (USTR) and the appropriate congressional committees, consultations between the USTR and relevant private sector advisory committees, and an opportunity for public comment. The petitioners assert that the respondents in this investigation make no effort to argue that these requirements have been met with respect to the Department's practice. Furthermore, according to the petitioners, the respondents present no rationale for why the Department would be justified in circumventing the role of both Congress and the USTR, as set forth in the statute, by changing its practice in response to (rather than in implementation of) an adverse report issued by a dispute settlement panel or the Appellate Body.

The Department's Position:

We disagree with the respondents and ABCC and have not changed our calculation of the weighted-average dumping margins for the final determination. Specifically, we made model-specific comparisons of weighted-average EPs or CEPs with weighted-average NVs of comparable merchandise. See section 773(a) of the Act; see also section 777A(d)(1)(A)(i) of the Act. We then combined the dumping margins found based upon these comparisons, without permitting non-dumped comparisons to reduce the dumping margins found on distinct models of subject merchandise, in order to calculate the weighted-average dumping margin. See section 771(35)(A) and (B) of the Act. This methodology has been upheld by the CIT in Corus Engineering Steels, Ltd. v. United States, Slip Op. 03-110 at 18 (CIT 2003); and Bowe Passant Reiningungs-und Waschereitechnik GmbH v. United States, 240 F.Supp. 2d 1228 (CIT 2002). Furthermore, in the context of an administrative review, the Federal Circuit has affirmed the Department's statutory interpretation which underlies this methodology as reasonable. See Timken, 354 F. 3d at 1342.

The respondents and ABCC assert that the WTO Appellate Body ruling in U.S.-Softwood Lumber renders the Department's interpretation of the statute inconsistent with its international obligations and, therefore, unreasonable. However, in implementing the Uruguay Round Agreements Act, Congress made clear that reports issued by WTO panels or the Appellate Body "will not have any power to change U.S. law or order such a change." See the Statement of Administrative Action (SAA) at 660. The SAA emphasizes that "panel reports do not provide legal authority for federal agencies to change their regulations or procedures . . ." See Id. To the contrary, Congress has adopted an explicit statutory scheme for addressing the implementation of WTO dispute settlement reports. See 19 U.S.C. 3538. As is clear from the discretionary nature of that scheme, Congress did not intend for WTO dispute settlement reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 U.S.C. 3538(b)(4) (implementation of WTO reports is discretionary); see also, SAA at 354 ("After considering the views of the Committees and the agencies, the Trade Representative may require the agencies to make a new determination that is "not inconsistent" with the

panel or Appellate Body recommendations..." (emphasis added))

Comment 2: Calculation of the "All Others" Rate

ABCC argues that in the Department's preliminary determination it included Norte Pesca's margin of 67.80 percent in the calculation of the "all others" rate, which is applicable to the 20 or more ABCC members exporting to the United States, even though Norte Pesca's margin was attributable to the use of adverse facts available for certain cost data.

ABCC continues that this use of adverse facts available was based on Norte Pesca's refusal to provide information requested by the Department in the initial as well as in a supplemental questionnaire. ABCC argues that normally such a refusal would result in a finding by the Department that the respondent failed to cooperate to the best of its ability, thus warranting the calculation of Norte Pesca's rate entirely on the basis of adverse facts available. According to ABCC, had the Department based Norte Pesca's preliminary dumping margin entirely on adverse facts available, Norte Pesca's rate would not have been included in the weighted-average calculation used to establish the "all others" rate that is applied to the numerous non-investigated companies. ABCC asserts that, had Norte Pesca's rate been excluded, the "all others" rate would have been in the 10-12 percent range, as opposed to the current rate of 23.66 percent. Therefore, ABCC maintains that the wrongful inclusion of Norte Pesca in calculating the "all others" rate made a significant and prejudicial difference to the 20 or more non-investigated exporters. ABCC also notes that in the 1991 WTO Appellate Body decision in United States Antidumping Measures on Certain Hot Rolled Steel Products from Japan, WT/DS184/AB/R (July 24, 2001) (para. 129), the WTO held that the methodology used by the Department in the preliminary determination with respect to the approximately 20 non-investigated companies violated Articles 6.10 and 9.4 of the WTO Antidumping Agreement on Implementation of Article VI of GATT (April 15, 1994), reprinted in H.R. Doc. No. 103-316, Vol. I at 1455 (1994).

ABCC points out that these companies have no ability or standing at the Department to ameliorate a situation not of their own making. Moreover, many of the exporters are relatively small businesses, and cannot afford to post cash deposits equal to over 20 percent of the value of their shipments to the United States before the outcome of the first review.

ABCC further states that following the preliminary determination, Norte Pesca withdrew from further participation in this investigation. Therefore, ABCC contends that it can no longer be denied that Norte Pesca has failed to cooperate to the best of its ability and that the Department is compelled to apply an adverse facts available margin to Norte Pesca. As a result, ABCC submits that, under section 735(c)(5) of the Tariff Act of 1930, as amended (the Act), the Department must calculate the "all others" rate without reference to Norte Pesca's rate.

The petitioners did not comment on this issue.

The Department's Position

As discussed below in the “Company-Specific Issues” section, for purposes of the final determination, we calculated Norte Pesca’s dumping margin based on total adverse facts available under section 776(b) of the Act. Therefore, pursuant to section 735(c)(5)(A) of the Act, and in accordance with Department practice (see e.g., Notice of Amended Final Determination of Sales at Less Than Fair Value: IQF Red Raspberries from Chile, 67 FR 40270 (June 12, 2002)), we have not included Norte Pesca’s dumping margin in the calculation of the All Others rate.

II. Company-Specific Issues

CIDA

Comment 3: Billing Adjustments

CIDA claims that the Department should make an upward adjustment to gross unit prices to account for an amount of money that CIDA is currently attempting to collect from its U.S. customer. This amount reflects revenue associated with freight expenses that were allegedly inappropriately deducted from the price negotiated with the customer for some of the reported U.S. sales. We disallowed this billing adjustment for the preliminary determination because it did not appear that CIDA had actually received the revenue this adjustment represents. See Memorandum to Irene Darzenta Tzafolias from Rebecca Trainor, Re: Calculation Memorandum for the Preliminary Determination for CIDA, dated July 18, 2004.

CIDA states that the agreement between it and its customer called for the customer to pay a set amount for ocean freight and then deduct the freight charge from the price of the shrimp it purchased from CIDA during the POI. CIDA argues that it is rightfully due the money in dispute because the customer overstated the amount for freight that it was entitled to withhold. A suit was brought against the U.S. customer when CIDA found out that the customer was paying less than the assumed freight under the agreement, was pocketing the difference, and refusing to reimburse CIDA for the freight amount that CIDA overpaid.

CIDA argues that the reason the Department preliminarily denied the billing adjustment—because CIDA had not actually received the funds in question—is belied by the sales verification report, in which the Department states that CIDA does in fact have in hand the revenue that this adjustment represents. See Memorandum For The File Re: Sales Verification in Natal, Brazil of Central de Industrializacao e Distribuicao de Alimentos Ltda. (CIDA) in the Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from Brazil, dated October 19, 2004 (CIDA Sales Verification Report) at page 10. Furthermore, CIDA believes it is likely to prevail in its dispute in the Brazilian court. Therefore, CIDA argues, it should be allowed this freight-related billing adjustment, and its U.S. gross unit prices should be adjusted accordingly.

The petitioners argue that the adjustment claimed by CIDA stems from a contract dispute with its customer that is yet unresolved. Furthermore, the payment which the Department describes in the CIDA Sales Verification Report was made after the end of the POI, and cannot be tied to the disputed amount CIDA claims to be owed by its customer for sales made during the POI. Therefore, the petitioners claim, there is no evidence showing that CIDA has realized the payment of the disputed funds. Rather, such a payment appears to be an advance payment for a future shipment of shrimp.

The Department's Position:

CIDA is currently holding an amount of money in escrow as reimbursement for what it claims are overstated freight charges incurred during the POI (see CIDA Sales Verification Report at 10.) Although CIDA believes that it will ultimately be allowed to keep this money, the fact remains that the money is not at the company's disposal, and therefore the basis for the requested billing adjustment is only theoretical. Therefore, we have not allowed the billing adjustment for purposes of the final margin calculations.

Comment 4: Insurance Payments as an Offset to G&A Expenses

In its calculation of G&A expenses, CIDA included an offset for insurance payments received during the POI that were directly related to sales made prior to the POI. CIDA claims that the payment reduced the G&A expenses during the POI by an amount equal to the payment. Furthermore, CIDA claims that the payment is operational income since it related to an accident that occurred during the exportation of the subject merchandise. Finally, CIDA argues, because of the accident and the resultant loss of shrimp, it had to incur the cost of producing the product twice immediately prior to the POI, which affected costs during the POI.

The petitioners argue that the Department should reject CIDA's insurance claim, as it relates to a sale made previous to the POI and to fiscal year 2003. In support of its position, the petitioners cite Comment 6 of the Issues and Decision Memorandum regarding Final Determination of Less-Than-Fair-Value Investigation: Certain Cold-Rolled Carbon Steel Flat Products from Turkey, 67 FR 62126 (October 3, 2002) (Cold-Rolled Steel from Turkey), which noted that the reversal of certain expenses could not count as offsets to G&A because they related to prior fiscal years or non-G&A items. Moreover, the petitioners state, the Department's practice regarding insurance payments and proceeds which can be tied to particular sales is to treat such payments as sales-specific adjustments (see Final Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from Italy, 68 FR 6719 (February 10, 2003) (Sheet and Strip from Italy) rather than as a G&A-related adjustment).

CIDA counters that the reversals at issue in Cold-Rolled Steel from Turkey appear to have been book entries rather than receipts of actual money, as is the case for CIDA. Moreover, Sheet and Strip from Italy demonstrates that an occurrence outside the POI can still affect how items are treated within the POI. CIDA argues that, since there is no sale to adjust for the insurance proceeds, the income must be

treated as an offset to G&A. CIDA concludes that not to offset G&A costs for money actually received and booked during the POI would be improper since the income was clearly administrative in nature.

The Department's Position:

We have disallowed CIDA's claimed offset to G&A for the insurance payments at issue because they represent sales-related revenue rather than a G&A item. We normally treat insurance payments such as these, that can be directly tied to particular sales, as sales-related revenues. See Sheet and Strip from Italy at 6721 and Comment 1 of the accompanying Issues and Decision Memorandum. Because the revenue at issue is sales-related, it is not appropriate to use it to offset G&A. Furthermore, CIDA's reliance on Sheet and Strip from Italy is misplaced. In that case, insurance revenue received outside the POI could be tied to specific sales made during the POI. In this case, the sales associated with the insurance payments at issue were made before the POI. The Department does not make adjustments for sales-specific revenue received during the POI that relates to non-POI sales. Therefore, because, the revenue is inapplicable to the sales examined in this investigation, we have disregarded it for the final determination.

Comment 5: Collapsing CIDA with its Affiliated Processor

CIDA and its affiliated processing company, Produmar, are businesses owned and operated by members of the same family. A brother and sister jointly own CIDA, while their parents are the principal owners of Produmar. In the preliminary determination, consistent with 19 C.F.R. 351.401(h), we determined that Produmar was a toller rather than a manufacturer or producer, because it neither acquired ownership nor controlled the sale of the subject merchandise. See Preliminary Determination at 47087. Therefore, rather than collapsing these two entities and using Produmar's costs in our COP and constructed value (CV) calculations, we applied the "major input" rule, and used the transfer price for Produmar's processing services. In the preliminary determination, we stated that given the nature of the affiliation between the entities at issue, we recognize that a related issue could arise as to whether there is a potential for manipulation of price or production and, if so, whether the two entities should receive the same dumping rate. Based on this recognition, we solicited comments from the parties for consideration in the final determination. CIDA submitted comments in favor of collapsing, while the petitioner was silent on the matter.

CIDA contends that for the preliminary determination, the Department erroneously applied the "major input" rule and included in the COP calculation the transfer price paid by CIDA for processing services obtained from its affiliate, Produmar. CIDA argues that for the final determination, the Department should include the cost incurred by Produmar in providing these services instead of the transfer price in the COP and CV calculations, because during the POI these two companies operated as a single entity. CIDA states that during the POI, it obtained processing services from Produmar because it

does not own a plant to process raw shrimp into frozen shrimp (i.e., the subject merchandise). In support of its claim that these two companies operate as a single entity, CIDA maintains that: (1) these two companies share the same building and administrative space; (2) Produmar has no administrative staff and uses the administrative staff of CIDA; (3) CIDA's employees maintain Produmar's books and records; (4) Produmar's production workers take orders from one of CIDA's owners; and (5) the other CIDA owner operates and manages Produmar through a power of attorney executed by Produmar's principal owner. Further, during the POI, Produmar processed shrimp only for CIDA, and CIDA exported shrimp by using Produmar's export sanitary certificate. CIDA reiterates that all the above facts demonstrate that these two companies operate as one company, managed by the same individuals, and therefore, should be collapsed in this proceeding.

CIDA points out that for the preliminary determination, the Department determined that Produmar was not a manufacturer or producer because it did not acquire ownership and did not control the sale of the subject merchandise, and therefore, applied the "major input" rule. According to CIDA, this reasoning is appropriate provided the two affiliated companies operate independently of each other. In this instance, CIDA and Produmar operate as a single entity and not independently of each other. CIDA's management runs the day-to-day activities of Produmar. Thus, Produmar, or the individuals operating Produmar, do acquire ownership and do control the sales of the subject merchandise.

With respect to the "major input" rule, CIDA states that the Department has discretion in applying it because the statute and the Department's regulations provide that the Department may determine the value of the major input using information other than the reported costs if the Department has reasonable grounds to believe or suspect that an amount represented as the value of such input is less than the COP of such input. In support of this statement, CIDA cites section 773(f)(3) of the Act and 19 C.F.R. 351.407(b). CIDA asserts that the Department should utilize its discretion and not invoke the "major input" rule because there is no information on the record to suggest that the costs reported are incorrect. Moreover, CIDA claims that the value of services obtained by CIDA from Produmar is not a "major input" because the percentage of CIDA's total manufacturing cost that represents the value of services obtained from Produmar is lower than the percentage calculated by the Department for the preliminary determination.

Finally, CIDA contends that if the Department continues to disallow collapsing of these two companies and includes the transfer price paid to Produmar in the COP calculation, the Department should eliminate the double counting of Produmar's G&A, interest, tax, and packing labor expenses from the COP calculation. According to CIDA, the transfer price covers Produmar's manufacturing costs including packing labor, as well as Produmar's G&A, interest, and tax expenses.

Department's Position:

We agree with the respondent that the Department should collapse CIDA and Produmar. Sections 771(33)(F) and (G) of the Act provide that two or more persons directly or indirectly controlling, controlled by, or under common control with, any person, are affiliated, and any person

who controls any other person and such other person are affiliated, respectively. The Act goes on to state that a person shall be considered to control another person if that person is legally or operationally in a position to exercise restraint or direction over the other person. Evidence of actual control is not required; it is the ability to control that is at issue. See Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27296, 27297-27298 (May 19, 1997). Moreover, the Department may consider control to arise from the potential for manipulation of price and production. See Certain Welded Carbon Standard Steel Pipe and Tubes From India; Final Results of New Shippers Antidumping Duty Administrative Review, 62 FR 47632, 47638 (September 10, 1997).

CIDA is a limited partnership company owned by two individuals, Rayana Franca and Arimar Franca Filho, sister and brother. Produmar is a closely held corporation and owned by several individuals. Mr. Arimar Franca, who is the father of Rayana Franca and Arimar Franca Filho, is the principal owner of Produmar. Mr. Arimar Franca has delegated all his responsibilities to Rayana Franca through a power of attorney. Arimar Franca Filho is also the director of Produmar. The business cards of Rayana Franca and Arimar Franca Filho show that they represent both companies, CIDA and Produmar.

Further, Arimar Franca Filho, who is in charge of CIDA's purchases, sales, and logistics, is also responsible for Produmar's production of raw shrimp into frozen shrimp. He draws the production schedules and manages the plant employees of Produmar. The production workers of Produmar are under the direction of Arimar Franca Filho. Rayana Franca, who is in charge of CIDA's finances and operations including accounts, billing, and invoicing, also runs the day-to-day activities of Produmar. CIDA and Produmar are able to share sales information and are involved in production and pricing decisions because the same individuals who manage CIDA's operations, also manage Produmar's operations.

In addition, CIDA and Produmar share the same building and the same mailing address. One portion of the building houses CIDA's sales and administrative offices, while the other portion houses Produmar's production facility. They also share the same telephone and fax numbers. Produmar has no administrative staff. The staff of CIDA conduct the administrative functions of Produmar, and also maintain Produmar's books and records. During the POI, CIDA obtained all of its processing services from Produmar, and Produmar provided processing services only to CIDA. CIDA did not obtain processing services from any other processor and Produmar did not perform processing services for any other seller. Also, for the purposes of exporting frozen shrimp, CIDA utilizes Produmar's sanitary certificate.

Based on the evidence on the record, the Department determines that CIDA, through its owners, has the ability to control Produmar and that the two entities are affiliated, as defined in sections 771(33)(F) and (G) of the Act and 19 C.F.R. 351.102(b). Pursuant to 19 C.F.R. 351.401(f), the Department will treat two or more affiliated producers as a single entity if those producers have 1) production facilities for similar or identical products that would not require substantial retooling of either facility in order to

restructure manufacturing priorities, and 2) the Department concludes that there is a significant potential for the manipulation of price or production, as evidenced by the following, non-exhaustive list of factors: a) the level of common ownership, b) the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and c) whether the firm's operations are intertwined such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers. See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Sweden, 63 FR 40449, 40452-53 (July 29, 1998).

The Department has long recognized that it is appropriate to treat certain groups of companies as a single entity, and to determine a single weighted-average margin for that entity, in order to determine margins accurately and to prevent manipulation that would undermine the effectiveness of the antidumping law. The Department “collapsed” entities prior to the promulgation of 19 C.F.R. 351.401(f). In Queen’s Flowers, the CIT upheld the Department’s practice of collapsing two entities that were sufficiently related to present the possibility of price manipulation. Queen’s Flowers de Colon v. United States, 981 F. Supp 617, 628 (CIT 1997). More recently the CIT found that collapsing exporters, rather than producers, is consistent with a “reasonable interpretation of the antidumping duty statute.” See Hontex Enterprises Inc. d/b/a Louisiana Packing Company v. United States of America, 248 F. Supp. 2d 1323 (CIT 2003) (Hontex). The court went on to note that “to the extent that Commerce has followed its market economy collapsing regulations the NME exporter collapsing methodology is necessarily permissible.” Hontex, 248 F. Supp. 2d at 1342.

While 19 C.F.R. 351.401(f) applies only to producers, the Department has found it to be instructive in determining whether non-producers should be collapsed and used the criteria outlined in the regulation in its analysis. See Freshwater Crawfish Tail Meat From the People’s Republic of China: Final Results of Administrative Antidumping Duty and New Shipper Reviews, and Final Rescission of New Shipper Review, 65 FR 20948 (Apr. 19, 2000) and accompanying Issues and Decision Memorandum at Section C (the administrative determination under review in Hontex); and Honey from Argentina: Final Results of Antidumping Duty Administrative Review, 69 FR 30283 (May 27, 2004) (collapsing of affiliated resellers); and Certain Preserved Mushrooms from the People’s Republic of China: Final Results of the Sixth Antidumping Duty New Shipper Review and Final Results and Partial Rescission of the Fourth Antidumping Duty Administrative Review, 69 FR 54635 (September 9, 2004) (where the Department collapsed producers and their exporters).

Accordingly, we have looked to the criteria articulated in section 351.401(f)(2) in determining whether to treat these affiliates as a single entity. Regarding section 351.410(f)(2)(ii), as discussed above, the management of Produmar is largely controlled by the two individuals who own and manage CIDA. Section 351.401(f)(2)(iii) of the Department’s regulations specifically calls on the Department to examine whether “operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated {parties}.” In addition, because Produmar has a fully functioning facility for producing the subject merchandise, which is located on the same premises as and is

controlled by CIDA, the role of producer and seller could easily switch from CIDA to Produmar without substantial retooling at either company. As such, we consider there to be significant potential for manipulation of price and production between CIDA and Produmar and have treated them as a single entity for the final determination.

Because we determined to treat CIDA and Produmar as a single entity, the “major input” rule, and the G&A, interest, tax, and packing labor expense arguments are moot. Specifically, it is the Department’s practice not to apply the “transactions disregarded” or the “major input” rules in accordance with section 773(f)(2) and (3) of the Act to transfers when we treat affiliates as a single entity. See Notice of Final Results of Antidumping Duty Administrative Review: Certain Pasta from Italy, 64 FR 6615, 6624 (February 10, 1999) and Notice of Final Results of Antidumping Duty Administrative Review: Certain Steel Concrete Reinforcing Bars from Turkey, 69 FR 64731 (November 8, 2004), and accompanying Issues and Decision Memorandum at Comment 16. See also AK Steel Corporation v. United States, 34 F. Supp. 2d, 756 (CIT 1998), *aff’d in part, rev’d in part*, 99-1296, (Federal Circuit), 2000 U.S. App. LEXIS 2670, February 23, 2000 (where the Court upheld the Department’s determination not to apply section 773(f)(2) and (3) of the Act to transactions within a single entity). Therefore, for the final determination, we have used the actual costs including the G&A, interest, tax, and packing labor expenses incurred by Produmar in valuing the processing services provided to CIDA.

Comment 6: Cost Allocation Methodology

The petitioners contend that, for cost reporting purposes, CIDA adopted an unreasonable cost allocation methodology for its raw shrimp, and variable and fixed manufacturing overhead costs. According to the petitioners, CIDA allocated the total raw shrimp cost to specific products based on the relative weight of the head-on shrimp required to produce the specific products. This methodology implies that the purchase price of head-on raw shrimp is proportionately related to the size of the raw shrimp on a per-kilogram basis. Moreover, CIDA allocated variable and fixed manufacturing overhead costs based on the relative allocated cost of the raw shrimp. The petitioners maintain that this allocation methodology is not supported by any evidence on the record and substantially distorts the respondent’s reported product-specific manufacturing costs. The petitioners claim that CIDA has repeatedly informed the Department that the company is neither concerned with the relative weight of the raw shrimp input nor with the recording of count-size-specific raw shrimp costs in its accounting system. The petitioners argue that for the final determination, the Department should revise CIDA’s reported raw shrimp, and variable and fixed manufacturing overhead costs to reflect the manner in which these costs are recorded in CIDA’s normal books and records, as one average per-unit cost.

The petitioners maintain that even though CIDA pays different prices for different sizes of raw shrimp, CIDA does not find it necessary to track count-size-specific raw shrimp costs in its normal books and records. For this reason, CIDA had to adopt an allocation methodology to differentiate and report count-size-specific raw shrimp costs. According to the petitioners, prior to using this weight-based allocation methodology, CIDA adopted two other methodologies. One based on Urner Barry gauge differences and the other based on CIDA’s own export performance by count size.

Further, the petitioners contend that the Department should not use the Urner Barry allocation factors because Urner Barry prices are limited to the U.S. prices of frozen shrimp, include imports from South and Central America, include frozen shrimp which has been processed from both farm-raised and wild-caught fresh shrimp, are wholesale prices, and include prices from countries that are accused of dumping in the United States. The petitioners claim that there is also no reason for the Department to believe that the Brazilian prices for head-on raw shrimp used as an input in the production of the subject merchandise would be meaningfully correlated to the prices for export of frozen headless shrimp to the United States. The petitioners point out that CIDA has not provided any evidence to support its claim that manufacturing overhead costs vary proportionately to the size of shrimp on a per-kilogram basis.

According to the petitioners, section 776(a)(2) of the Act instructs that the Department shall use facts otherwise available where: (1) the necessary information is not available on the record; (2) an interested party withholds requested information; (3) an interested party fails to provide such information by the deadlines for submission of the information in the form and manner requested; (4) an interested party significantly impedes a proceeding; or (5) an interested party provides information that cannot be verified. The petitioners advocate that in this case, the Department should apply facts otherwise available to allocate CIDA's shrimp and manufacturing overhead costs because CIDA's weight-based cost allocation methodology cannot be verified. CIDA was unable to provide documents (e.g., invoices, purchase orders, trade publications, etc.) in support of this methodology. In addition, CIDA has failed to report raw shrimp costs on a count-size-specific basis in a manner that reconciles with the company's books and records. Moreover, there is no evidence on the record that the variable and fixed manufacturing overhead costs vary in proportion to the allocated raw shrimp costs. The petitioners claim that it does not require a measurably greater amount of energy to freeze a pound of large shrimp than it would to freeze a pound of small shrimp. Further, the petitioners state that CIDA itself claims that the variable and fixed manufacturing overhead costs do not change with the size of the shrimp. In support of this statement, petitioners refer to CIDA's first supplemental section D questionnaire response of July 21, 2004, at page 9.

CIDA contends that the methodology employed by CIDA to allocate raw shrimp and manufacturing overhead costs is reasonable and should be used for the final determination. CIDA maintains that it had to resort to an allocation methodology because it does not keep records regarding the various sizes of raw shrimp purchased or the price paid per count size. CIDA states that prior to developing this weight-based allocation methodology, it had reported costs based on two other methodologies: one based on Urner Barry gauge differences and the other based on CIDA's own export performance by count size. See pages 8 through 10, and the cost database submitted in attachment 10 of the June 28, 2004, section D questionnaire response submitted by CIDA. According to CIDA, these two other methodologies were based on the differences in selling prices of the finished products, and not on cost differences relating to raw shrimp inputs. CIDA asserts that the weight-based allocation methodology is the best among all the three methodologies and most accurately represents the cost per count size of raw shrimp. According to CIDA, the weight-based allocation methodology contains fewer flaws than the other two methodologies, it is not influenced by unrelated data such as the price of finished frozen

shrimp, it relies on CIDA's total cost of purchased shrimp, and it takes into account the yield loss and the count sizes sold. The weight-based methodology uses a rational approach; in the absence of any data showing otherwise, costs will vary proportionately with count sizes. Further, CIDA points out that the Urner Barry prices do vary proportionately with count sizes.

According to CIDA, the Department agrees that the price paid for the purchase of raw shrimp increases as the count size of shrimp increases. See Memorandum from Sheikh M. Hannan and Mark J. Todd, Senior Accountants, to Neal M. Halper, Director, Office of Accounting, Re: Verification Report on the Cost of Production and Constructed Value Data Submitted by Central de Industrializacao e Distribuicao de Alimentos Ltda., dated October 19, 2004 (CIDA Cost Verification Report), at page 2. The issue is whether the increase is directly proportionate to the relative per-unit weight of the shrimp. CIDA reiterates that the purchase price of shrimp is directly proportionate to the weight of the shrimp when the totality of purchases over a year are considered. While the differences in cost per size may vary slightly from invoice to invoice, over a full year these variations will balance out. CIDA further maintains that the variable manufacturing overhead costs consist mainly of energy and freezing costs, and larger shrimp take more time to freeze than smaller shrimp. Moreover, the fixed manufacturing overhead is the same irrespective of head status, and both head-on and headless shrimp pass through the same classifying equipment.

Further, CIDA claims that the use of a single per-unit average raw shrimp cost for all frozen shrimp regardless of head status or count size as suggested by the petitioners, is contrary to the Department's requirement that the respondent differentiate costs for the different product characteristics of the merchandise under consideration. In support of this claim, CIDA cites Notice of Preliminary Results of Antidumping Duty Administrative Review: Stainless Sheet and Strip from Republic of Korea, 66 FR 41530 (August 8, 2001), where the Department found that the reported product-specific costs were unusable because the respondent was unable to capture the discrete costs for all the unique product characteristics. The Department then applied facts available and further warned the respondent that in future reviews it risked the application of adverse facts available in the event that it failed to report cost data that is allocated sufficiently to unique control numbers in a manner that is verifiable. CIDA maintains that in this case it has provided the product-specific costs that differentiate the raw shrimp count sizes by allocating the total raw shrimp cost in a manner that is reasonable and based on CIDA's own data. CIDA refutes the petitioners' claim that CIDA does not keep track of raw material costs on a count-size- specific basis in its normal books and records by stating that CIDA initially tracks the purchase prices it pays for the different count sizes of raw shrimp, but subsequently destroys the documents that record the count-size-specific raw shrimp costs. CIDA claims that after the processing of raw shrimp, it does not continue to maintain the count-size-specific raw shrimp costs because the company does not need to know the costs by count sizes. Finally, with respect to variable manufacturing overhead costs, CIDA asserts that larger shrimp take more time to freeze because of surface area, and therefore, consume more energy and freezing costs.

The Department's Position:

The Department has used the cost database that allocated raw shrimp costs using Urner Barry prices. In accordance with section 773(f)(1)(A) of the Act, the Department normally relies on data from a respondent's books and records where those records are prepared in accordance with the home country's generally accepted accounting principles (GAAP), and where they reasonably reflect the costs of producing the merchandise. In the instant case, CIDA does not maintain count-size-specific shrimp cost records. Thus, in an attempt to try to comply with the Department's requests to differentiate costs by count size, CIDA used a weight-based methodology to report product-specific costs.

The weight-based methodology, adopted by CIDA to allocate total raw shrimp costs to specific products, implies that the purchase price of head-on raw shrimp on a per-kilogram basis is proportional to the size of the raw shrimp (i.e., when the size doubles, the purchase price doubles). However, CIDA was unable to provide evidence to support this implication. In its normal course of business, CIDA purchases different count sizes of head-on raw shrimp at different prices for each size. However, after the raw shrimp is processed, the documents showing the count sizes and respective prices are destroyed. As such, CIDA was unable to provide the purchase documents or any other information to support the reasonableness of its claim that the increase in raw shrimp prices is directly proportional to the count size of the shrimp. The only information related to raw shrimp costs that CIDA could substantiate and the Department could verify was the total head-on raw shrimp cost and the associated total purchase quantity for the POI. CIDA provided no documentation to support the accuracy of its reported weight-based size-specific shrimp cost allocation methodology. In fact, what CIDA provided were mere conjectures. Based on our review of the other participating respondent's data in this case and publicly available information (i.e., Urner Barry), it appears that the per-unit price increase for shrimp of various sizes is not directly proportional to the count size of the shrimp.

Pursuant to section 776(a)(1) of the Act, when necessary information is not available on the record, the Department must rely on the facts otherwise available. When a respondent's submitted costs do not reasonably reflect the costs of producing the merchandise due to limitations in the respondent's records, kept in the ordinary course of business and where the respondent has made every attempt to comply with all the Department's requests for information, the Department's practice is to apply facts available in determining the product-specific cost of producing the merchandise. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Durum Wheat and Hard Red Spring Wheat from Canada, 68 FR 52741 (September 5, 2003), and accompanying Issues and Decision Memorandum at Comment 20, and Notice of final Results of Antidumping duty Administrative Review: Honey from Argentina, 69 FR 30283 (May 27, 2004), and accompanying Issues and Decision Memorandum at Comment 1. In this case, as noted above, CIDA does not maintain product-specific costs in its normal books and records and adopted, for reporting purposes, a weight-based allocation methodology. However, we determined based on record evidence that a weight-based allocation methodology is not appropriate. Although we have rejected its weight-based allocation methodology, CIDA made every attempt to comply with all of the Department's requests to allocate costs on a reasonable basis. Therefore, pursuant to section 776(a)(1) of the Act, we deem it appropriate to resort to facts otherwise available on the record to obtain product-specific costs. As facts available, we

determined that an allocation of raw shrimp prices based on relative size-specific Urner Barry prices reasonably captures the product-specific cost differences for each count size. Therefore, for the final determination, we used the cost database that CIDA submitted using Urner Barry prices to allocate raw shrimp costs for purposes of the calculation of COP and CV.

Urner Barry is a publisher of pricing and other market information for the poultry, egg, meat, seafood, and related segments of the food industry. On a regular basis, Urner Barry publishes shrimp prices by count sizes that are exported by different countries and sold in the United States. The Urner Barry information used by CIDA to develop the reported count-size-specific raw shrimp costs is: (1) publicly available; (2) widely used in the industry; (3) contemporaneous with the POI; (4) for white shrimp from Central and South America; and (5) an objective source as it was not provided or developed by any party to the proceeding, or for purposes of this proceeding. With respect to the concerns raised by both CIDA and the petitioners about Urner Barry prices, we recognize that the Urner Barry information is not perfectly comparable to the input shrimp used in the production of subject merchandise, because Urner Barry prices are for frozen, shell-on shrimp which have undergone a certain measure of processing. However, since the necessary information is not available on the record in selecting from the facts otherwise available, the Department determined that the five benefits listed above and the goal of improving overall accuracy by calculating reasonable count-size-specific raw shrimp costs outweigh the respondents' and the petitioners' concerns. Moreover, the Urner Barry information is widely used by the sellers of the subject merchandise to anticipate the prices they will receive, and accordingly, it is reasonable to assume that they negotiate the purchase price of the raw shrimp with their suppliers based on the relative size-specific prices for the finished product. In addition, the raw shrimp cost constitutes a significant portion of the subject merchandise cost, and to a large extent, depends on the sale price of the subject merchandise. Use of the Urner Barry prices to calculate the raw shrimp costs by count sizes in this case is consistent with the Department's decision to use this data for raw shrimp surrogate valuation purposes in the companion investigations of frozen and canned warmwater shrimp from the Socialist Republic of Vietnam and the People's Republic of China. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam, 69 FR 71005 (December 8, 2004), and accompanying Issues and Decision Memorandum at Comment 1, and Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the People's Republic of China, 69 FR 70997 (December 8, 2004), and accompanying Issues and Decision Memorandum at Comment 1.

We disagree with the petitioners that the Department should use a single per-unit average raw shrimp cost for all frozen shrimp produced by CIDA, regardless of head status or count size, adjusting only for yield factors associated with different products. Based on our knowledge of shrimp purchase costs in Brazil, the purchase cost of shrimp increases with count size and affects the variable manufacturing costs of the subject merchandise. Therefore, for the final determination, the product-specific COP and CV used for the dumping analysis must differentiate the raw shrimp costs by count size. In our initial section D questionnaire, we requested that CIDA provide product-specific costs taking into account count size, one of the physical characteristics identified in sections B and C of our questionnaire. Moreover, section 773(a)(6)(C)(ii) of the Act directs the Department to make an adjustment to NV to

account for differences in the physical characteristics of the merchandise where similar products are compared. In addition, 19 C.F.R. 351.411(b) directs us to consider differences in variable costs associated with the physical differences in the merchandise. As such, the Department requires that a respondent differentiate costs for the unique physical characteristics associated with the products. The Department's questionnaire specifies that the respondent's submitted costs must account for POI cost differences for each of the physical characteristics identified in the section B and C questionnaires.

In this proceeding the Department relies on facts available, pursuant to section 776(a)(1) of the Act, because CIDA did not maintain count-size-specific purchase records for use in this investigation. However, the Department's preference is to use the actual count-size-specific costs paid by CIDA to its shrimp suppliers. CIDA has acknowledged that it initially tracks the purchase prices it pays for the different count sizes of raw shrimp, but after the processing of raw shrimp the documents that record the count-size raw shrimp costs are destroyed. See CIDA's rebuttal brief of November 12, 2004, at pages 4 and 5. As CIDA is able to track count-size-specific costs, the Department expects that in any future administrative review, CIDA will act to the best of its ability by maintaining the necessary information in its books and records to allocate raw shrimp costs by count size.

With respect to the variable and fixed manufacturing overhead costs, we agree with the petitioners that production quantity should be used to allocate these costs to specific products. In its normal books and records, CIDA does not allocate variable and fixed manufacturing overhead costs to specific products. For submission purposes, CIDA allocated these costs to specific products in proportion to the allocated raw shrimp costs. We have determined that raw shrimp costs are not the appropriate allocation base. The variable manufacturing overhead costs mostly consist of freezing and energy costs. We agree with CIDA that on an individual shrimp basis, it may take more energy to freeze a larger shrimp than a smaller one. However, because there is no basis to find that freezing costs per kilogram are proportional to shrimp size, it is reasonable to assume that it should take the same amount of energy to freeze one kilogram of shrimp irrespective of count size, provided it is packaged similarly. CIDA's packages only differ with respect to weight. See the cost verification exhibit 10 at page 24.

The fixed manufacturing overhead costs mostly consist of spare parts, repair and maintenance, and depreciation expenses. Normally, the variable and fixed manufacturing overhead costs tend to correlate with the direct labor costs because all products do not pass through all of the same production processes. In this case, the head-on, headless, and peeled shrimp pass through the same mechanical processes and use the same equipment. The de-heading and peeling are manual processes. As such, the direct labor cost may not be a proper allocation base for these overhead costs. Rather, we consider total production quantity to be a more appropriate allocation base. This is supported by CIDA's own statement that the variable and fixed manufacturing overhead costs do not change with the sizes of the shrimp. See CIDA's first supplemental section D questionnaire response of July 21, 2004, at page 9. In addition, CIDA recognizes that it has used the same allocation methodology for raw shrimp and variable and fixed manufacturing overhead costs. However, the correct allocation should be the total variable and fixed manufacturing overhead costs divided by the total production quantity. See the methodology adopted to calculate the cost of the shrimp, submitted by CIDA as the attachment

to the August 11, 2004, questionnaire response. Therefore, for the final determination, we have used the production quantity as the allocation base for the variable and fixed manufacturing overhead costs.

Comment 7: Ration and Larva Costs

The petitioners contend that during the POI, CIDA was involved in the purchase and sale of ration and larva used by shrimp farmers. CIDA discontinued this business in September 2003 because it was operating at a loss. The petitioners claim that for reporting purposes CIDA has appropriately included these costs because they are related to the production of frozen shrimp, but has under-reported the amount of feed and larva loss. The petitioners advocate that, for the final determination, the Department should increase CIDA's raw material costs for the correct amount of feed and larva loss which is the total purchase amount less the sales revenue.

CIDA contends that it has reported two shrimp costs in the cost database. SHRIMP1 includes the ration and larva costs, while SHRIMP2 does not include the ration and larva costs. CIDA maintains that it included ration and larva costs in SHRIMP1 out of an abundance of caution because it did not want to be penalized for failing to report ration and larva costs if the Department were to determine at some point that ration and larva costs must be included in the reported costs. CIDA insists that it has reported the correct amount (*i.e.*, the net loss of the ration and larva business) but argues that the Department should not include these costs because they do not relate to the production of frozen shrimp, but rather a separate line of business.

The Department's Position:

We agree with CIDA, and have not included ration and larva costs in the COP calculation. Prior to September 2003, in addition to manufacturing frozen shrimp, CIDA was involved in the purchase and sale of ration and larva used by shrimp farmers. CIDA discontinued the ration and larva operations because it was running at a loss. However, CIDA continued to manufacture frozen shrimp even after closing the ration and larva operations. The sales and the associated costs of ration and larva constituted a significant portion of CIDA's revenue and cost, and were recurring in nature. Moreover, CIDA planned to continue to sell these items on a regular basis to unaffiliated shrimp farmers, prior to the closing of these operations. As such, we consider these transactions to be related to a line of business other than the manufacturing and sale of frozen shrimp. It is the Department's practice to exclude revenues and costs associated with a separate line of business when calculating the COP of the subject merchandise. See Notice of Final Results of Antidumping Duty Administrative Review: Certain Preserved Mushrooms from Indonesia, 66 FR 36754 (July 13, 2001) and accompanying Issues and Decision Memorandum at Comment 8 (Mushrooms from Indonesia), and Notice of Final Results of Antidumping Duty Administrative Review: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan, 67 FR 2408 (January 17, 2002) and accompanying Issues and Decision Memorandum at Comment 7 (Hot-Rolled Products from Japan). In Mushrooms from Indonesia, the Department excluded revenues and associated costs from sales of spawned compost and casing soil made by a respondent to independent mushroom farmers from the calculation of COP. In Hot-Rolled Products

from Japan, the Department excluded the profit and loss on sales of purchased supplies and utilities sold by the respondent from the reported costs. Therefore, for the final determination, we have not included the revenues and the costs associated with the sales and purchases of ration and larva in our calculation of COP.

Comment 8: Loss on Sale of Fixed Assets

The petitioners contend that during FY 2003, CIDA incurred a net loss on the sale of a shrimp farm and other fixed assets. The petitioners advocate that the Department should include the net loss on the sale of fixed assets in the respondent's G&A expense rate calculation because it is the Department's practice to normally include gains and losses from the sale of fixed assets that are routine in nature and incurred in the ordinary course of business. In support of this position, the petitioners cite Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Germany (Steel Flat Products from Germany), 67 FR 62116 (October 3, 2002), and accompanying Issues and Decision Memorandum at Comment 16. As such the petitioners assert that in this case the loss on the sale of fixed assets is directly related to the general operations of the company, not an extraordinary item, and should be included in the reported G&A expenses.

CIDA contends that during FY 2003 it sold a shrimp farm and some other fixed assets. CIDA maintains that it properly excluded the loss from the sale of the fixed assets from the reported G&A expenses because the assets sold were not related to the production of frozen shrimp. CIDA reiterates that a loss on the sale of fixed assets is not an operating expense and does not constitute an actual outlay of funds; the loss is extraordinary. In addition, most of the costs for the shrimp farm were incurred before the POI and were capitalized. Further, CIDA maintains that if the company sold some assets and made a profit, the Department would not have used the profit as an offset to the COP.

CIDA finds the petitioners' reliance on Steel Flat Products from Germany misplaced. According to CIDA, in Steel Flat Products from Germany the loss was routine in nature and incurred in the ordinary course of business. In contrast, in this case the sale of the shrimp farm was neither routine in nature nor conducted in the ordinary course of business because the entire farm and not some of the assets of the farm was sold. Moreover, CIDA does not normally sell assets.

The Department's Position:

The Department has determined it appropriate to exclude the loss on the sale of the shrimp farm from the G&A expenses, and include the net gain or loss on the sale of the remaining fixed assets in the G&A expense rate calculation. CIDA is in the business of producing and selling frozen shrimp, not selling entire operations or farms. We consider the sale of the shrimp farm to be a separate ongoing business operation that does not relate to the general operations of the company. Rather, the sale of an ongoing business operation relates to that business operation and not the general operations of the company as a whole. See Certain Polyester Staple Fiber From Korea: Final Results of Antidumping Duty Administrative Review and Final Determination To Revoke the Order in Part, 69 FR 61341 (October

18, 2004), and the accompanying Issues and Decision Memorandum at Comment 2. When determining if an activity is related to the general operations of the company, the Department considers the nature, the significance, and the relationship of that activity to the general operations of the company. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon-Quality Steel Plate Products from Korea, 67 FR 73196, 73210 (December 29, 1999). Consistent with this approach, we consider the sale of the remaining fixed assets to be routine sales of machinery and equipment which are a normal part of ongoing operations for a manufacturing company. Accordingly, any resulting gains or losses are normally included as part of the G&A expense rate calculation. Conversely, the sale of a fully functioning separate operation or farm is a significant transaction, both in form and value, and the resulting gain or loss generates non-recurring income or losses that are not part of a company's normal business operations and are unrelated to the general operations of the company. See Polyethylene Terephthalate Film, Sheet and Strip From Korea: Final Results of Antidumping Duty Administrative Review, 66 FR 57417 (November 15, 2001), and accompanying Issues and Decision Memorandum at Comment 1. In this case, the shrimp farm did not cease to exist or operate. It continued as it had before the divestiture; it simply operated with new owners. Therefore, this divestiture cannot be considered an insignificant or routine transaction. Thus, for the final determination, we have not included the loss on the sale of the shrimp farm but have included the net gain from the sale of the remaining fixed assets in the G&A expense ratio calculation.

Comment 9: ICMS Taxes

CIDA contends that the full amount of ICMS tax credit should be included as an offset to its reported tax expenses. CIDA points out, that in accordance with the new Brazilian tax legislation, a company can offset ICMS tax owed by the company with the claimed ICMS credit, or it can sell the credit to another company. According to CIDA, the company needs to record the ICMS credit when it uses or sells the credit, and for this reason the company recorded a partial amount instead of the full amount in its books and records. Finally, CIDA maintains that if the Department does not include the full amount because it believes it was not properly recorded, the Department should include the partial recorded amount as an offset to CIDA's reported tax expenses.

The petitioners argue that the Department should not include the full amount or the partial recorded amount of ICMS credit as an offset to CIDA's reported tax expenses. The petitioners maintain that if these ICMS credits had a monetary value, CIDA should have recorded the full amount in its books of accounts. In addition, the petitioners contend that there were no ICMS activities during the POI or FY 2003 because the partial recorded amount, as evidenced by the company's trial balances, did not change during the corresponding periods.

The Department's Position:

We disagree with CIDA. ICMS is a value-added state sales tax. Manufacturers are allowed to credit the ICMS taxes they pay on inputs against the taxes they collect on home market sales in determining the net amount they are required to remit to the Brazilian government. However, where the amount of taxes paid on inputs exceeds the taxes collected on domestic sales, no provision under the ICMS scheme provides for the government to directly remit or refund the taxes paid on inputs to the manufacturer. Thus, if the ICMS paid on these production inputs exceeds the amount collected from domestic sales, then the company receives a credit for the difference but no refund. ICMS is typically not charged on export sales. Therefore, ICMS credit is received from the government for ICMS paid on inputs used in the production of goods that are exported. A manufacturer may purchase raw materials or electricity using ICMS credits.

In this case, based on record evidence, it does not appear that CIDA received an ICMS tax credit during the POI or for FY 2003. While CIDA claims that it received an ICMS tax credit during the POI, we reviewed CIDA's books and records and determined that no tax credit was recorded during the period in question, nor were any ICMS tax credits refunded to CIDA. Moreover, CIDA did not use ICMS credit to purchase raw materials or electricity because CIDA has acknowledged that CIDA/Produmar did not purchase raw materials or electricity by using tax credits during the POI. See CIDA's section D response of July 1, 2004, at pages 11 and 12.

As such, CIDA's claim that the full amount of the ICMS credit received during the POI should be included as an offset is without merit. CIDA does not pay ICMS taxes on raw shrimp and mini box inputs, nor did they provide record evidence to substantiate the credits alleged to be earned. See Cost Verification Report, at pages 19 and 28. In addition, the partial ICMS tax credit amount recorded was received by CIDA prior to the POI. The balances recorded in CIDA's books and records did not change during the POI or FY 2003. Therefore, for the final determination we have excluded the claimed ICMS credit from the COP calculation.

Comment 10: Change in Raw Shrimp Inventory

CIDA asserts that in reporting the per-unit costs of frozen shrimp it included the cost of raw shrimp purchased during the POI. CIDA claims that the value of raw shrimp inventory increased from the beginning of the POI to the end of the POI. CIDA maintains that it should have used the raw shrimp consumption amount (*i.e.*, beginning inventory plus purchases less ending inventory) instead of the purchased amount, in the per-unit cost calculation. Therefore, CIDA requests the Department to revise the reported per-unit cost accordingly.

The petitioners argue that there is no evidence on the record to support CIDA's claim that its raw shrimp inventory increased during the POI. The petitioners maintain that the values in the company's trial balances which CIDA claims to represent raw shrimp inventory, actually represent finished goods inventory. This is supported by CIDA's own statement that prior to FY 2003, CIDA in its normal books and records did not track the shrimp inventory. In support of this position, the petitioners refer to page 19 of the Cost Verification Report.

The Department's Position:

We agree with the petitioners that CIDA was unable to support its claimed raw shrimp inventory change. At verification, we requested that CIDA provide documentation of its inventory balances. Company officials indicated that for a part of the period in question it did not track shrimp inventory. See Cost Verification Report at page 19. Thus, the accuracy of CIDA's claimed inventory change in question, and the products to which it may relate are unknown. We therefore deem it inappropriate to adjust CIDA's reported raw material costs for the undocumented inventory change.

Comment 11: Prompt Payment Discounts

CIDA claims that in calculating the reported financial expense ratio, it inadvertently included the total prompt payment discount amount it received during the POI from its raw shrimp suppliers as an offset to its interest expense. CIDA maintains that it should have adjusted the raw shrimp costs instead of the interest expenses for the prompt payment discounts. CIDA requests the Department to revise the reported per-unit raw shrimp costs accordingly.

The petitioners did not comment on this issue.

The Department's Position:

We disagree with CIDA that the Department should reduce its reported material costs for what CIDA claims is an early payment discount for raw material purchases. In its case briefs, CIDA for the first time claims that a portion of its interest income relates to early payment discounts on raw shrimp purchases. There is no record evidence supporting this claim. Accordingly, we have continued to include the total interest income as an offset to the financial expense computation and not as a reduction to raw material costs.

EMPAF

Comment 12: Presumed Credit and IPI Export Credit Premium Revenues

EMPAF argues that the Department must account for the presumed credit and IPI export credit premium revenues in its NV calculations because the two tax credits received and earned were directly related to exports, and EMPAF did not earn or receive these credits in connection with home market sales. EMPAF submits that the Department should account for these benefits either by preferably making an upward adjustment to U.S. price or, in the alternative, a downward adjustment to home market price, pursuant to the circumstance-of-sale (COS) provision. EMPAF further suggests that if the Department does not agree with this adjustment, it should at a minimum make a downward adjustment to EMPAF's COP to account for the value of the tax credits earned and received during the POI.

EMPAF further argues that during the sales verification, the Department confirmed that EMPAF earned and received tax credits under both federal government tax credit programs. According to EMPAF, there is no issue as to the amount of tax credits both earned and received by EMPAF during the POI, and the fact that the credits earned and received are directly related to EMPAF's exports.

EMPAF believes that the Department goes to great lengths in its antidumping investigations to ensure that its margin calculations are based on symmetrical comparisons and will make adjustments (e.g., for differences in taxation, differences in packing types, differences in credit costs, and differences in level of trade) to ensure such symmetry in its calculations, regardless of the nature of the adjustment. EMPAF states that, in addition, the Department makes price adjustments for any revenues or benefits received by an exporter due to a government program. EMPAF asserts that in the event that revenues or benefits are subject to a separate finding in a parallel countervailing duty investigation, and such benefits are found to be derived from an export subsidy program, the Department is required to make an upward adjustment to U.S. price, pursuant to section 772(c)(1) of the Act. EMPAF argues that the statute clearly embraces a policy that, where a benefit related to export sales exists, the Department will make an adjustment to its price-to-price calculations for revenues received from a government program. EMPAF believes that this policy is correctly applied even when the program is not subject to a separate countervailing duty investigation.

In support of its position, EMPAF cites Huffy v. United States, 632 F. Supp. 50, 55-56 (CIT 1986) (Huffy), where the Court found that the Department should not refrain from making an adjustment to price in an antidumping investigation due to a concern that the underlying revenue would be found to be countervailable. EMPAF also cites Sawhill Tubular v. United States, 666 F. Supp. 1550, 1557 (1987) (Sawhill) where the Department defended its decision to make a downward adjustment to NV to account for benefits received by an Indian respondent specific to its exports. EMPAF also states that in the underlying less-than-fair-value determination associated with this court case the Department rejected the petitioners' arguments that the Department should not make a COS adjustment. See Certain Welded Carbon Steel Standard Pipe and Tube from India: Final Determination of Sales at Less Than Fair Value, 51 FR 9089, 9091 (March 17, 1986) (Pipe and Tube from India).

EMPAF believes that the Department's practice and policy are clear: the Department must rid its antidumping comparisons of any discrepancy in net revenues received in the two markets that is independent of a decision by the respondent to export the subject merchandise at a price less than NV. Therefore, EMPAF argues that given the direct relationship between the presumed credit program and the IPI export credit premium and EMPAF's exports, the Department should make an adjustment to its dumping calculations to ensure that they account for this revenue specific to export sales.

EMPAF further argues that in the case of both the presumed credit and the IPI export credit premium, both of which are directly tied to export sales, there is a clear incentive to use the credit to increase the recipient's share of export markets. However, EMPAF claims that because both subsidies are received only on export sales, there is no incentive to lower the price of domestic sales. EMPAF then reasons that, as a result, unless export prices are properly adjusted, the export subsidy creates the

appearance of dumping-related price discrimination up to the full amount of the subsidy. However, EMPAF contends that this is not the result of dumping but is the direct result of the export subsidy. EMPAF argues that if the Department does not adjust for the price effect of the subsidy, it will be granting relief to the petitioner in a dumping investigation for a matter that is properly addressed in the context of a countervailing duty investigation. Therefore, to comply with the statutory obligations to focus only on price discrimination in antidumping proceedings, and the mandate of Article 2.4 of the WTO Antidumping Agreement, EMPAF maintains that the Department should make either an upward adjustment to U.S. price, or a downward COS adjustment to NV for the export benefits received under the two export tax credit programs in effect during the POI.

In the event that the Department is unwilling to make a price-related adjustment for the export benefits, EMPAF argues that the Department should make a downward adjustment to EMPAF's COP for the export benefits received during the POI. EMPAF claims that the Department routinely makes downward adjustments to a respondent's COP, or in some cases CV, for benefits received from a government. EMPAF acknowledges that the Department tends to make such an adjustment to COP when the benefits are not export-related.² However, EMPAF reasons that in the case of export-related benefits, it would be incorrect to account for the benefits from these programs as an offset to total production costs because this would, in effect, assign a portion of the benefit to production for sale in the home market. In other words, EMPAF argues that although the benefits under these programs are earned and received only in connection with export sales, this methodology would incorrectly allocate these benefits to all production. In addition, EMPAF argues it would incorrectly ignore the effects of these revenues in the Department's price-to-price comparisons for home market sales that pass the cost test. In conclusion, in the event the Department is unwilling to make an adjustment to pricing to account for the benefits under the presumed credit and IPI export premium programs, EMPAF urges the Department to make a downward adjustment to EMPAF's COP for revenues received under these programs during the POI. EMPAF claims that to do otherwise would impermissibly ignore revenues received by EMPAF during the POI that reduced EMPAF's costs of production.

The petitioners argue that EMPAF makes no effort to explain how the export tax credit programs are tied to any taxes actually incurred by the company in Brazil which would warrant a reimbursement. The petitioners contend that EMPAF has provided a fundamentally flawed reading of the statute and an inaccurate characterization of the Department's practice in this area. According to the petitioners, a review of the material relied upon by EMPAF demonstrates that the Department is not to make any COS adjustment based on a respondent's participation in an export subsidy program.

²In support of its position, EMPAF cites, among other cases, Final Determination of Sales at Less Than Fair Value: Pasta from Italy, 61 FR 30326, 30355 (June 16, 1996) (Pasta from Italy), Notice of Final Determination of Sales at Less Than Fair Value: Aramid Fiber Formed of Poly-Phenylene Terephthalamide from the Netherlands, 59 FR 23684 (May 6, 1994) (Aramid Fiber from the Netherlands), and Final Determination of Sales at Less Than Fair Value: Oil Country Tubular Country Goods from Argentina, 60 FR 33539, 33546 (June 28, 1995) (OCTG from Argentina).

The petitioners contend that the statute does not support EMPAF's request for a COS adjustment. The petitioners argue that sections 772(c)(1)(A) and (B) of the Act provide no support for EMPAF's claimed adjustment because EMPAF does not claim that the revenue it receives from the Brazilian government is (1) related to the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the subject merchandise in condition packed ready for shipment to the United States, or (2) part of a duty drawback program. Therefore, according to the petitioners, EMPAF's claim for statutory support must come from section 772(c)(1)(C) of the Act. However, the petitioners maintain that the express language of the provision gives no support to EMPAF's argument because an adjustment pursuant to this provision can be made only where a countervailing duty has been imposed on the subject merchandise. Therefore, the petitioners argue that because no countervailing duty has been or will be imposed on the subject merchandise in this or any companion investigation, the provision is inapposite to this case.

Moreover, the petitioners argue that EMPAF is incorrect in its contention that "the statute clearly embraces a policy that, where a benefit related to export sales exists, the Department will make an adjustment to its price-to-price calculations for revenues received from a government program."³ The petitioners argue that both the legislative history and Department practice confirm that the purpose of section 772(c)(1)(C) of the Act is to prohibit the domestic industry from receiving an unwarranted "double remedy" by the imposition of an antidumping duty and countervailing duty that address "the same situation of dumping or export subsidization."⁴ According to the petitioners, it is only when the Department is engaged in "parallel antidumping and countervailing duty investigations" and has "imposed" a countervailing duty to offset an export subsidy that section 772(c)(1)(C) is implicated."⁵

The petitioners maintain that under EMPAF's reading of the statute, if the Department imposes a countervailing duty to offset an export subsidy on a respondent, that respondent would obtain two adjustments to U.S. price - an adjustment for the amount of the countervailing duty and a COS adjustment for the amount of any export subsidies received. However, the petitioners protest that it would be completely illogical to include the amount of a countervailing duty in the export price if the value of the underlying export subsidy were already included in the export price.

Furthermore, the petitioners also believe that Pipe and Tube from India demonstrates that no COS adjustment is warranted in EMPAF's case. The petitioners submit that in Pipe and Tube from India the Department revisited its granting of a COS adjustment for the revenue received on export sales from the Indian government's rebate program, changed its policy, and declined to continue to make a COS

³EMPAF case brief at 8.

⁴See, e.g., Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Korea, 67 FR 62124, 62125 (October 3, 2002).

⁵Id.

adjustment based on the export subsidy program.⁶ In addition, according to the petitioners, in Sawhill the CIT ruled that it was within the ITA's authority to make a COS adjustment for the IPRS tax, but not that it was the only reasonable determination that could be made.

The petitioners continue that the Department stated that it had reexamined its position and determined that the better view was one in conformity with the agency's holding in Final Determination of Sales at Less Than Fair Value: Industrial Phosphoric Acid from Israel, 52 FR 25440 (July 7, 1987).

According to the petitioners, the CIT affirmed the Department's practice and found that there was a meaningful distinction between payments which are directly related to a sale and those which are only tied to a sale, "the latter category including those payments which are merely predicated upon the act of exportation." Pipe and Tube from India Administrative Review at Comment 3. In contrast to EMPAF's assertions, the petitioners argue that the Department's current (and longstanding) practice is to deny requests for COS adjustments based on benefits received from export subsidy programs.

Finally, the petitioners advocate the rejection of EMPAF's request for an adjustment to its COP, in the event that its request for a COS adjustment is not granted. According to the petitioners, the Department's practice demonstrates that no adjustment to COP will be made if the respondent has merely shown that the rebate was linked to export sales. See Canned Pineapple Fruit from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 64 FR 69481, 69484-85 (December 13, 1999). In this investigation, the petitioners contend that EMPAF has made no effort to establish any link between its COP and the revenue obtained from Brazil's two export subsidy programs. Therefore, the petitioners argue that EMPAF's request for a COP adjustment should be denied.

The Department's Position:

We have not made an adjustment for the tax credits at issue. Section 772(c)(1) of the Act limits additions to the EP or CEP starting price to packing, rebated imported duties (i.e., "duty drawback"), or the amount of any countervailing duty imposed on the product to offset an export subsidy. The Brazilian export credit programs at issue do not meet any of these conditions. The programs are not contingent upon importation of inputs used to produce the exported subject merchandise—the duty drawback system contemplated under 772(c)(1)(B) of the Act. See e.g., Certain Welded Carbon Pipes and Tubes from India: Final Results of Antidumping Duty Administrative Review, 63 FR 32825, 32828-29 (June 16, 1998). Similarly, section 773(a)(6) of the Act does not provide for this type of adjustment to NV. Therefore, there is no statutory basis for adjusting EMPAF's price data for these export credits. We also disagree with EMPAF's contention that we should account for these export credits by reducing its costs because section 773(b)(3) of the Act provides no basis for such a

⁶See Final Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Standard Pipe and Tube from India, 57 FR 54360 (Comment 3) (November 18, 1992) (Pipe and Tubes from India Administrative Review).

reduction when the respondent participates in export credit programs such as those presented here. See also Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from Chile, 63 FR 56613 (October 22, 1998).

Moreover, EMPAF's reliance on Pipe and Tube from India in support of its position is misplaced because the Department subsequently reversed itself in an administrative review of that order, determining that the receipt of export subsidies bore no direct relation to the sales under review and, therefore, could not constitute a difference in the circumstance of sale. We also note that Pasta from Italy and OCTG from Argentina, cited by EMPAF to support its argument that the Department may make an adjustment to COP when benefits are not export-related, both involved cases where a countervailing duty had been imposed on the subject merchandise. In accordance with section 772(c)(1)(C) of the Act, an adjustment to U.S. price can only be made for a countervailing duty that has been imposed on the subject merchandise for export subsidies, which is not the case in the instant investigation. In addition, EMPAF's reliance on Huffy is misplaced. In that case, the Court reaffirmed the principle that the Department only makes adjustments for export subsidies when it has determined in a countervailing duty investigation that such subsidies are countervailable and imposed duties to offset those subsidies. See Huffy at 56. Accordingly, we have disregarded the claimed tax credit adjustments at issue in our final margin calculation for EMPAF.

Comment 13: Brazilian Indirect Selling Expenses

EMPAF argues that the revised Brazilian indirect selling expense calculation (INDIRSH), submitted as part of the August 25, 2004, supplemental Section D questionnaire response, more accurately reflects the manner in which such expenses were incurred. EMPAF states that the revised methodology provides separate selling expense factors for each of its three cost centers, as opposed to the original methodology which was based on a single Brazilian indirect selling expense factor. According to EMPAF, the Department verified the revised calculation and did not raise questions with respect to the revised methodology. Therefore, EMPAF asserts that the Department should accept the cost center-specific factors for purposes of the final margin calculation.

The petitioners argue that the reporting of branch-specific ratios subsequent to the Preliminary Determination is suspect, appears to be highly distortive, is inconsistent with record evidence, and therefore should be rejected by the Department. The petitioners assert that while the Department may have confirmed the calculation of each separate branch's indirect selling expense ratio, it did not verify the reasonableness of the assignment of branch-specific codes to each sale. Moreover, according to the petitioners, it is not possible from the record to reconcile the volumes of sales used for the branch-specific ratio calculations to the respective volumes reported in the revised sales database. Thus, for purposes of the final determination, the petitioners argue that the Department should reject EMPAF's revised branch-specific indirect selling expense ratios and use a single ratio for all home market sales.

The Department's Position:

We agree with EMPAF that its revised indirect selling factors are a more accurate depiction of its home market indirect selling expenses. The revised figures reported are based on EMPAF's actual books and records and represent a more specific level of reporting. Accordingly, we believe that EMPAF's methodology is reasonable.

The Department verified that sales are indeed made by specific branches and are reported as such in the home market sales listing. The Department also verified that the selling expenses reported for each branch are the actual expenses for each branch. Therefore, the Department finds that the respondent's revised reporting methodology is reasonable in this case.

With respect to the petitioners' concern that it is not possible to reconcile the volumes of sales used for the branch-specific ratio calculations to the respective volumes reported in the revised sales database, this discrepancy can be explained based on the fact that the branches may sell more than subject merchandise, whereas the home market sales database includes only sales of subject merchandise. See Verification Exhibit 4, "Quantity and Value - Home Market," of the Memorandum from Katherine Johnson to The File Re: Sales Verifications in Recife, Brazil and Miami, Florida of Empresa de Armazenagem Frigorifica Ltda. (EMPAF) and its U.S. Affiliate Netuno USA (NetUSA) in the Antidumping Duty Investigation of Certain Frozen and Canned Warmwater Shrimp from Brazil, dated October 21, 2004 (EMPAF Sales Verification Report). Furthermore, at verification we tied the POI sales value for each of the branches to the trial balance and then to the financial statement without discrepancy. Accordingly, for purposes of the final determination, we used EMPAF's reported Brazilian indirect selling expense calculation in Attachment B-26 of the August 25, 2004, supplemental Section D questionnaire response, as revised based on the Department's verification findings. See page 31 of the EMPAF Sales Verification Report.

Comment 14: U.S. Indirect Selling Expenses

In order to report indirect selling expenses incurred by NetUSA, EMPAF's U.S. affiliate, on U.S. sales, EMPAF calculated a ratio of total indirect selling expenses incurred by NetUSA's frozen department during 2003 to total sales of NetUSA's frozen department during the same period. This ratio reflected total expenses incurred and total sales made by NetUSA with respect to both subject and non-subject frozen products. While NetUSA performs selling activities and incurs expenses on behalf of all U.S. sales, including direct sales, the denominator of this ratio calculation did not include the value of direct sales made by EMPAF through NetUSA, as NetUSA does not recognize these sales as its own sales in its financial accounting records. Therefore, in order to apportion an amount relevant to total sales of the subject merchandise (including direct sales), it applied to this ratio another ratio reflecting the value of NetUSA's sales of subject merchandise (exclusive of direct sales) during the POI to the value of total sales of subject merchandise (including direct sales) during the POI. The Department accepted this methodology in the preliminary determination. EMPAF provided a slightly revised calculation at verification which the Department examined. See page 31 and Verification Exhibit CEP12 of the EMPAF Sales Verification Report.

The petitioners claim that EMPAF's methodology to account for NetUSA direct sales inappropriately understates EMPAF's indirect selling expenses. According to the petitioners, in order to account for NetUSA direct sales, the Department should simply include the amount of these sales in the denominator of the indirect selling expense calculation.

The petitioners further argue that by multiplying the ratio of NetUSA sales to total frozen shrimp sales to the previously reported NetUSA indirect selling expense ratio for the frozen department, EMPAF understated its indirect selling expense ratio. In addition, the petitioners protest that EMPAF has not supported its claim that the proportion of sales through NetUSA to EMPAF's direct sales is relevant to its indirect selling expense ratio calculation. The petitioners continue that if EMPAF is concerned that an indirect selling expense ratio derived exclusively from sales through NetUSA is being applied to both direct sales and NetUSA sales, any correction should, at most, include the amount of direct sales in the denominator of the calculation. The petitioners add, however, that the record in this investigation does not permit such an adjustment because EMPAF did not report its direct sales for the same time period as its reported indirect selling expenses for NetUSA (calendar year 2003).

Moreover, the petitioners contend that EMPAF's revised methodology assumes that NetUSA performed sales activities on the same proportion of EMPAF sales of non-subject merchandise as it did on sales of subject merchandise -- a claim that remains unsubstantiated, according to the petitioners. If the Department wants to address EMPAF's concern that its original INDIRS1U calculation failed to take into account the direct sales values in the denominator of the calculation, the petitioners argue that the calculation could be revised to, at most, include the amount of direct sales in the denominator of the calculation.

EMPAF argues that the Department should revise its calculations to include the refined U.S. market indirect selling expense ratio, which EMPAF incorporated in its revised U.S. sales database submitted to the Department on November 15, 2004. EMPAF explains that the Department incorporated its indirect selling expense methodology into its calculation of the preliminary margin, and verified both the methodology and the underlying figures during the sales verification.

EMPAF notes that the indirect selling expense ratio must be derived from a calculation that incorporates the universe of sales to which the indirect selling expenses are applicable -- in this case, both NetUSA and direct sales of all frozen products. EMPAF included this universe of sales in its indirect selling expense ratio and, according to EMPAF, calculated a ratio that best incorporates the sales to which NetUSA's selling expenses apply. In calculating this ratio, EMPAF maintains that it made a reasonable assumption that the ratio of direct sales to total sales of subject merchandise during the POI reflected the ratio of direct sales of frozen non-subject merchandise to total sales of such products. Moreover, EMPAF argues that, contrary to the petitioners' assertion, there is evidence on the record to support this assumption. Specifically, EMPAF claims that evidence collected during the sales verification demonstrates that the percentage of direct sales to total sales of frozen non-subject merchandise during the POI is almost exactly the same as the percentage of direct sales to total sales of frozen subject merchandise during the same period. EMPAF submits that this information

demonstrates the reasonableness of its methodology in calculating the U.S. indirect selling expense ratio.

With respect to the petitioners' argument that EMPAF did not report its direct sales for the same time period as its reported indirect selling expense for NetUSA (calendar year 2003), EMPAF argues that there is a nine-month overlap between the POI sales data and the 2003 data. EMPAF believes that the POI sales data is a useful source for establishing what portion of the total sales of subject and non-subject frozen merchandise is direct.

EMPAF further argues that the petitioners' proposed methodology would seriously understate the value of those sales to which the indirect selling expense ratio must be applied, ensuring that there is no symmetry between the denominator of the indirect selling expense ratio and the universe of sales to which it is applied. Similarly, EMPAF disagrees with the alternative suggestion, hinted at by the petitioners, to simply add the value of direct sales of frozen subject and frozen non-subject merchandise to the denominator. EMPAF explains that the value of direct sales of subject merchandise and the value of direct sales of frozen non-subject merchandise do not reflect "landed" U.S. prices. As the indirect selling expense ratio is applied to a "landed" U.S. gross price, according to EMPAF, this approach would be distortive as it would introduce an additional inconsistency between the denominator in the indirect selling expense ratio calculation, and the prices to which the ratio is applied. Therefore, for purposes of the final determination, EMPAF argues that the Department should conclude that the indirect selling expense ratio and related methodology submitted by EMPAF, used by the Department in the preliminary determination, and verified by the Department, is reasonable and provides the most accurate representation of the universe of sales to which the indirect selling expense ratio must be applied.

The Department's Position:

We verified all aspects of the U.S. indirect selling expense calculation and noted no discrepancies with EMPAF's and NetUSA's books and records. The adjustment EMPAF applied to the indirect selling expense ratio was necessary in order to account for the lack of direct sales in the denominator of the indirect selling expense ratio calculation. Based on our review of the record evidence, we note that the percentage of direct sales to total sales of frozen non-subject merchandise during the POI is almost exactly the same as the percentage of direct sales to total sales of frozen subject merchandise during the same period and, therefore, we do not find it unreasonable for EMPAF to have applied the NetUSA sales value ratio, as described above, to the indirect selling expense ratio. See Verification Exhibit 5, "Quantity and Value - United States," of the EMPAF Sales Verification Report. Furthermore, in response to the petitioners' argument that EMPAF applied a POI sales ratio to a 2003 expense ratio, there is no reason to believe that the relationship between the direct sales and total sales made during the POI is distortive or otherwise not reflective of NetUSA's selling experience during 2003. Therefore, we believe that EMPAF applied a reasonable allocation methodology in its calculation of U.S. indirect selling expenses to account for the direct sales not included in the indirect selling expense ratio calculation based on NetUSA's books and records.

With respect to the petitioners' argument that in order to demonstrate the reasonableness of EMPAF's methodology it would have to present evidence that NetUSA performed sales activities on the same proportion of EMPAF sales of non-subject merchandise as it did on sales of subject merchandise, we verified the selling activities of NetUSA on all subject merchandise sales, inclusive of direct sales. See EMPAF Sales Verification Report at 8. While we did not specifically examine NetUSA's selling activities with respect to non-subject merchandise sales, as non-subject merchandise sales are not the focus of this investigation, we did note at verification that all customer interface for all U.S. sales made by EMPAF through NetUSA is provided by NetUSA. We have no evidence on the record to suggest that EMPAF performed a disproportionate amount of selling activities on EMPAF's sales of non-subject merchandise.

Finally, we do not disagree with the petitioners in theory that in order to ensure that the indirect selling expense ratio is properly applied to both direct and NetUSA sales, it may be more appropriate to include in the denominator of the 2003 indirect selling expense ratio the value of direct sales of frozen subject and frozen non-subject merchandise, rather than to apply a POI sales ratio to the 2003 expense ratio. In this case, however, the direct sales values on the record do not reflect the full "as sold" prices to the ultimate customer in the United States. Therefore, including them in the denominator of the indirect selling expense ratio which is ultimately applied to the "as sold" prices would distort the indirect selling expense calculation. Accordingly, for purposes of the final determination, we have continued to use the U.S. indirect selling expense methodology employed in the Preliminary Determination.

Comment 15: Container Weight

In the calculations for the preliminary determination, the Department included container weight as the eleventh matching characteristic in the model matching hierarchy used for product comparisons. This characteristic defines both the number of ounces for shrimp sold in cans, as well as the weight of the bag (e.g., one pound, two pounds) for shrimp sold in bags.

EMPAF argues that the Department should not include container weight as a product matching characteristic because it is commercially insignificant and relates only to packing size or form, rather than the physical attributes of the product. EMPAF argues that, as a practical matter, the Department's approach to container weight prevents matches between U.S. and home market products that are physically comparable in every way except for the type of packaging used. According to EMPAF, differences in container weight are not accounted for in a DIFMER adjustment as there are no differences in variable costs due to container weight. EMPAF maintains that differences in container weight impact only packing costs. EMPAF cites Stainless Steel Round Wire from Taiwan: Final Determination of Sales at Less Than Fair Value, 64 FR 17336 (April 9, 1999), in support of its argument that it is not the Department's practice to consider packing as part of the CONNUM characteristics. Accordingly, EMPAF advocates the elimination of the container weight factor from the list of the CONNUM categories.

The petitioners argue that the Department properly rejected the argument that container weight be eliminated as a product matching criterion in the Preliminary Determination and clearly informed EMPAF of its reasoning for denying the respondents' request. Therefore, according to the petitioners, the burden was on EMPAF to provide record evidence demonstrating that the Department's conclusion was incorrect. Because EMPAF failed to present any meaningful argument demonstrating that container weight is not "an integral part of the final product sold to the customer," the petitioners argue that the Department need not revisit its reasonable conclusion for purposes of the final determination.

Moreover, the petitioners point out that frozen shrimp, and IQF shrimp in particular, is often packaged in bags for individual sale, and while the shrimp inside these bags may be identical, in many cases, the container size is an integral part of the product. In these cases, the petitioners maintain that the customer is not buying a shrimp *per se*, but rather bags of shrimp, where the type and size of packaging is an important determinant of the markets and channels through which the shrimp can be commercialized.

In addition, with respect to EMPAF's argument that including container weight in the product characteristics hierarchy is not in accordance with Department practice, the petitioners assert that the Department has not used packing as part of the model match hierarchy, but rather has utilized the packaging of the product in the hierarchy. The petitioners maintain that the packaging of the product (as opposed to its packing) is unquestionably an integral part of the product sold to the customer. The petitioners cite Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from India, 63 FR 72246 (December 31, 1998), in support of its position that Department practice clearly supports the use of container weight as part of the product matching characteristics.

Finally, the petitioners believe that EMPAF has failed to provide any record evidence demonstrating that container weight is commercially insignificant and relates only to packing size or form, rather than the physical attributes of the product. Also, according to the petitioners, EMPAF has disregarded the Department's clear practice of accounting for packaging in its product comparisons. Therefore, for purposes of the final determination, the petitioners argue that the Department should keep container weight as a model match characteristic.

The Department's Position:

In the preliminary determination, we considered the issue of whether or not the Department should continue to include container weight as a product matching characteristic. We determined that:

Regarding the container weight criterion, we have included it as the eleventh criterion in the product characteristic hierarchy because we view the size or weight of the packed unit as an integral part of the final product sold to the customer, rather than a packing size or form associated with the shipment of the product to the customer. Moreover, we find it appropriate, where possible (other factors being equal), to compare products

of equivalent container weight (e.g., a one-pound bag of frozen shrimp with another one-pound bag of frozen shrimp, rather than a five-pound bag), as the container weight may impact the per-unit selling price of the product.

See Preliminary Determination, 69 FR at 47115.

The parties in this proceeding disagree on the merits of this issue, but provided no data analysis on the record from the parties to support their respective arguments. Given that the respondent has provided no evidence to support its conclusion that container weight has no impact on selling prices, we find no basis to reconsider our finding that it is appropriate to include container weight as a product matching characteristic. We continue to find it to be an integral part of the final product sold to the customer based upon our analysis in the preliminary determination. Furthermore, the use of container weight as a product matching characteristic is consistent with certain past cases involving processed agricultural products. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from India, 63 FR 72246 (December 31, 1998), and Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Pasta from Italy, 61 FR 1344 (January 19, 1996).

Comment 16: SPECIES Product Characteristic

EMPAF argues that the Department should revise its methodology with respect to the SPECIES product characteristic field because the current categories are imprecise and not sufficient to reflect the species of shrimp. EMPAF presumes that when the Department developed the species field it intended to include all distinctions in species and not simply general color differences that do not accurately account for all distinctions in species.

EMPAF claims that it sells two distinct species of “white” shrimp - farm-raised and wild-caught. According to EMPAF, their physical characteristics, uses, cost bases, and pricing are significantly different. EMPAF argues that without accounting for the difference between farm-raised and wild-caught white shrimp, the Department’s approach would elevate color as a material difference for matching purposes, and at the same time consider species irrelevant. Furthermore, EMPAF maintains that neither producers nor customers in the frozen shrimp industry view the products as being the same. Accordingly, EMPAF requests that the Department revise its methodology with respect to SPECIES to reflect the actual species of the shrimp.

The petitioners argue that EMPAF has failed to demonstrate that there are any meaningful physical differences among white shrimp. The petitioners claim that the basis of EMPAF’s argument is limited to the assertion that white shrimp that is farm-raised in Brazil is scientifically classified as *Litopenaeus vannamei*, while white shrimp that is wild-caught is scientifically classified as *Itopenaeus schmitti*. Furthermore, the petitioners contend that there is no record support for EMPAF’s characterization of the market for *Litopenaeus vannamei* and *Itopenaeus schmitti*.

The petitioners also argue that EMPAF has made no effort to meet its burden with respect to demonstrating that white shrimp should be further subdivided by the method of their harvest. In fact, according to the petitioners, the record contradicts EMPAF's claims because the Uner Barry pricing submitted on the record in this investigation has one category for white shrimp from Brazil: "Central & South American - white shrimp." Accordingly, for purposes of the final determination, the petitioners argue that the Department should make no adjustment to the species category.

The Department's Position:

We have not differentiated between species types beyond the color classifications identified in the questionnaire because we do not find that such differentiations reflect meaningful differences in the physical characteristics of the merchandise. The Department considers only "meaningful" or "significant" physical characteristics in its selection of product characteristics. See Emulsion Styrene-Butadiene Rubber from Mexico: Notice of Final Determination of Sales at Less Than Fair Value, 64 FR 14872, 14875 (March 29, 1999), and Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom: Final Results of Antidumping Administrative Review, 63 FR 18879, 18881 (April 16, 1998). We noted in the Preliminary Determination that whether shrimp is farm-raised or wild-caught is not a physical characteristic of the shrimp, but rather a method of harvesting. See Preliminary Determination at page 47085. In addition, although EMPAF claims that the physical characteristics, uses, cost bases, and pricing are significantly different between farm-raised and wild-caught shrimp, and producers and customers in the frozen shrimp industry view the products as distinct, it has not demonstrated its claim on the record. Although there may be some differences associated with the cost of farm-raised versus wild-caught shrimp, we found no pattern of consistent cost differences between farm-raised and wild-caught shrimp at verification. See cost verification exhibit 1, "Minor Corrections." Moreover, we were unable to discern any distinctions in price related to species classifications beyond color based on the data on the record. Therefore, for purposes of the final determination, we have made no adjustment to the species category.

Comment 17: Accounting Errors Prior to the Cost Reporting Period

EMPAF argues that the Department should not adjust its COP for an accounting error from 2002, prior to the cost reporting period. EMPAF states that the accounting error relates to a balance in the year-end 2002 inventory account of Maricultura shrimp processed by EMPAF. Respondent points out that the adjustment was to an inventory clearing account that should always clear to zero because EMPAF does not purchase fresh shrimp from Maricultura, but merely acts as a toll processor. EMPAF contends that the cost of the shrimp is maintained on Maricultura's books and the clearing account is only used for control purposes in EMPAF's books and records. EMPAF explains that it records a notional value for Maricultura's shrimp when it arrives at EMPAF's facilities and as soon as the shrimp is processed and shipped, usually within hours, the account is cleared. On December 31, 2002, EMPAF incorrectly reflected a value in the inventory clearing account by reflecting the balance in the account as inventory owned by EMPAF which overstated EMPAF's earnings in its 2002 financial statements. EMPAF states that by the time this error was discovered, it was not possible to make an

adjustment to the 2002 results; therefore, it had to make an adjustment to costs in its 2003 records. EMPAF contends that this error adjustment in 2003 is not a cost of subject merchandise in 2003 any more than it was earnings in 2002; therefore, the Department should not increase EMPAF's reported cost of processed shrimp by this amount.

The petitioners argue that section 773(f)(1)(A) of the Act specifies that the costs of production should be based on the books and records of the exporter of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise. The petitioners point out that in Final Determination of Less Than Fair Value of Sales of Certain Hot-Rolled Carbon-Quality Steel Products from Brazil, 64 FR 38,756 (Comment 43) (July 19, 1999) (Certain Hot-Rolled Carbon-Quality Steel Products from Brazil), the Department stated "In such instances where the total costs reported in the cost accounting system differ from the total costs reported on the financial statements, we typically rely on the amounts reported on the company's audited financial statements prepared in accordance with GAAP, provided that it does not result in distorted per-unit costs." The petitioners contend that the accounting error related to shrimp received from Maricultura for processing and was reported in EMPAF's work-in-process inventory in the financial statements prepared for the year ended 2002. The petitioners state that if the error had related to a prior period, EMPAF would have restated the opening balance in the Maricultura work-in-process inventory.

The Department's Position:

We have determined that an adjustment for the alleged accounting error in question should be included in the costs of subject merchandise. EMPAF's claim that the error related to an incorrect balance in a year-end 2002 work-in-process inventory account is not supported by the evidence on the record. At the cost verification, the Department examined EMPAF's financial statements and trial balances for the years ending in 2002 and 2003. Neither the auditors' report, nor the footnotes to the financial statements, mention a correction of a prior-year accounting error related to inventory. The footnotes to EMPAF's unconsolidated and consolidated financial statements show the amount in question as ending inventory in 2002. EMPAF and Maricultura are two of the entities combined in the consolidated financial statements; however, the inventory amount in question was not eliminated on the consolidated financial statements, as it should be if the account was used for control purposes to record the transactions between EMPAF and Maricultura as the respondent claims. Furthermore, the inventory account that the respondent claims is a clearing account, and should have a zero balance at year end, continued to have a balance in the year ending 2003 financial statements, which were audited by an independent public accountant. We traced the inventory amounts from the audited financial statements to the same account in EMPAF's year ending 2002 and 2003 trial balances; for both years examined, the trial balance account did not clear out to zero and EMPAF maintained a year-end inventory balance in the account.

Section 773(f)(1)(A) of the Act directs the Department to rely on the costs of production in the books and records of the exporter of the merchandise, if such records are kept in accordance with the GAAP of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise. As the petitioners pointed out, in Certain Hot-Rolled Carbon-Quality Steel Products from Brazil the Department stated “In such instances where the total costs reported in the cost accounting system differ from the total costs reported on the financial statements, we typically rely on the amounts reported on the company’s audited financial statements prepared in accordance with GAAP, provided that it does not result in distorted per-unit costs.” In the current case, we conclude that including the effect of the change in EMPAF’s work-in-process inventory from the financial statements reasonably reflects the costs associated with the production and sale of the merchandise and does not distort the per-unit costs. Therefore, we have included the adjustment at issue to EMPAF’s beginning inventory in the reported costs.

Comment 18: Double Counting Indirect Selling Expenses

EMPAF stated that in its original G&A expense rate calculation it inadvertently included certain expenses in both the G&A expense rate calculation and the indirect selling expense rate calculation. However, EMPAF points out that they corrected the double counting in the G&A expense rate calculation submitted in the August 25, 2004, third supplemental D response. The petitioners did not comment on this issue.

The Department’s Position:

We agree with EMPAF and have used the G&A expense rate submitted in the August 25, 2004, third supplemental section D response as the starting point for the adjustments made to the G&A expense rate calculation in the final determination.

Comment 19: Amortization of Pre-Operational Costs

EMPAF states that Maricultura incurred and capitalized pre-operating costs relating to its shrimp farm operations prior to the cost reporting period. EMPAF argues that the amortization expense of these pre-operating costs is not a cost of fixed assets but merely the recognition of a deferred expense incurred in a time prior to the cost reporting period and, therefore, should not be included in the reported costs. EMPAF points out that if Maricultura elected to expense these costs when they were incurred and not capitalize them, these costs would not be included in the COP of the subject merchandise. EMPAF refers to the Department’s practice with regard to start-up adjustments to provide additional guidance as to the proper accounting treatment of expenses incurred prior to the cost reporting period. EMPAF points out that only in the rare instances where the Department grants a benefit in the form of a start-up adjustment does the Department require the amortization expense in subsequent reviews to be included in the cost of the subject merchandise. Therefore, EMPAF concludes the Department should not include deferred pre-operating amortization expenses in the COP unless there has been a start-up adjustment granted in the course of the proceeding.

The petitioners argue that the Department should include in the G&A expense rate calculation the amortization expense of the deferred pre-operating costs. The petitioners contend that the amortization costs are costs borne in the current cost reporting period and are included on EMPAF's audited financial statements and, therefore, must be accounted for in EMPAF's G&A expense ratio. The petitioners point out that EMPAF's reference to the Department's practice with respect to start-up costs is irrelevant to Maricultura's election to amortize these pre-operational costs in the cost reporting period. Therefore, for the final determination, the Department should follow EMPAF's normal books and records and include the amortization expenses in the calculation of the G&A expense ratio.

The Department's Position:

We have included the amortization expense of the deferred pre-operating costs in the G&A expense rate calculation. As stated above in Comment 17, section 773(f)(1)(A) of the Act directs the Department to rely on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the GAAP of the exporting country (or the producing country where appropriate) and reasonably reflect the costs associated with production and sale of the merchandise. Section 773(f)(1)(A) of the Act also states that the Department will consider whether "such allocations have been historically used by the exporter or the producer." Furthermore, as explained in the Statement of Administrative Action (SAA), "[t]he exporter or producer will be expected to demonstrate that it has historically utilized such allocations, particularly with regard to the establishment of appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs." See SAA at 834. In the current case, the amortization expense is reported on the audited financial statements and represents a cost of the current period. Normally GAAP allows costs to be deferred if the expenditure incurred benefits future periods. Similarly, the Department utilizes a start-up adjustment to allocate the costs incurred during the start-up period to the future periods that receive the benefits. Maricultura chose, under Brazilian GAAP, to capitalize these costs and amortize them over the period benefitted, in order to match the expense to the benefits received in future periods. Maricultura received the benefits of its shrimp farm operations prior to and during the cost reporting period, and, accordingly, has allocated the pre-operating costs to those periods. We believe this allocation reasonably reflects the costs associated with the production and sale of the merchandise during the cost reporting period and does not distort the per-unit costs. Therefore, consistent with the Preliminary Determination, we have continued to include the pre-operating expenses in the reported costs.

Comment 20: Allocation of Depreciation to Work-in-Process Inventory

The petitioners argue that the Department should expense in the current period the depreciation expense that was allocated to Maricultura's ending work-in-process (WIP) inventory. The petitioners state that this treatment is a deviation from Maricultura's normal books and records where depreciation was treated as a period cost and fully expensed in the December 31, 2003, audited financial statements. The petitioners point out that section 773(f)(1)(A) of the Act states that it is standard Department practice to treat expenses as they are reported in the company's normal books and

records, provided that doing so results in a reasonable representation of the company's costs. The petitioners contend that the Department should not permit EMPAF to distort its costs by departing from its normal accounting practice. Therefore, for the final determination, the Department should remove the capitalized depreciation expense from WIP inventory and include it in the reported fixed overhead costs.

The respondent did not comment on this issue.

The Department's Position:

We disagree with the petitioners and have continued to allow Maricultura to allocate a portion of its depreciation expense to its WIP inventory in the final determination. As stated in previous comments above, section 773(f)(1)(A) of the Act directs the Department to rely on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the GAAP of the exporting country (or the producing country where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise. In the current case, Brazilian GAAP allowed Maricultura not to include depreciation expense in the value of WIP inventory, but we concluded that depreciation expense is part of the product cost, and thus the value of WIP inventory should include an allocated portion of fixed overhead (*i.e.*, depreciation) costs. According to U.S. GAAP, the basis for establishing the cost of inventory is to include both raw material and conversion costs. As a result, the WIP and finished goods inventory accounts are to include an appropriate portion of direct material, direct labor, and indirect production costs (*i.e.*, both fixed and variable overhead). Furthermore, the Department has stated previously that inventory costs include direct materials, labor and overhead (*see* Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From Thailand, 60 FR 22,557 (May 8, 1995)). Therefore, for the final determination, we have continued to allow Maricultura to include an allocated portion of its depreciation expense in its WIP inventory.

Comment 21: Other Adjustments to Shrimp Costs

The petitioners state that during the cost verification, the Department found an unreconciled difference between the adjusted value of shrimp purchased in EMPAF's purchase ledger and the value of shrimp reported to the Department. The petitioners argue that in the final determination, the Department should adjust EMPAF's reported shrimp costs for the unreconciled difference between the purchase ledger and the reported costs. The petitioners also contend that the adjustment to the December 31, 2003, physical inventory should be included in the respondent's reported costs. To support their contentions to include the unreconciled difference and the physical inventory adjustment, the petitioners cite Certain Hot-Rolled Carbon-Quality Steel Products from Brazil at Comment 43, and Notice of Final Results of Antidumping Duty Administrative Review: Canned Pineapple Fruit from Thailand, 63 FR 7392 (Comment 2) (February 13, 1998), where, in both cases, the Department included in the reported costs adjustments to ending raw material inventories from the respondents' financial accounting systems.

The respondent did not comment on this issue.

The Department's Position:

We have included in the reported costs the adjustment for the unreconciled difference between the values in the purchase ledger and the reported costs, as well as the portion of the physical inventory adjustment related to shrimp raw materials and WIP. As the petitioners cited in Certain Hot-Rolled Carbon-Quality Steel Products from Brazil, the Department typically includes unreconciled differences that cannot be explained in the calculation of COP and CV unless the respondent can identify and document why such amount does not relate to the merchandise under investigation. See also, Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils from Taiwan, 64 FR 15493, 15498 (March 31, 1999) (wherein the Department determined that the respondent should include the unreconciled difference between amounts in the accounting records and the reported costs). Therefore, for the final determination we have included the unreconciled difference in the reported costs.

With respect to the adjustment to the physical inventory, the Department considers year-end inventory adjustments to be a period expense, and therefore a relevant cost during the POI. As the Department stated in Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Italy, 63 FR 40422, 40430 (July 29, 1998), "both raw materials and WIP inventories are inputs into the cost of manufacturing the merchandise. It is the Department's practice to recognize the full amount paid to acquire production inputs, which are included in raw materials and WIP inventories, in determining the cost of producing the merchandise." In that case, the Department only included the incremental change in the inventory write-down provision that is associated with raw materials and WIP inventories. The Department considers the finished goods inventory to be associated with determining the cost of goods sold and not in determining the cost of producing the merchandise, and so it did not include the year-end physical inventory adjustment in the reported costs. Accordingly, for the final determination, we have included only the physical inventory adjustment relating to raw materials and WIP as determined from cost verification exhibit 14, "Overall Reconciliation."

Norte Pesca

Comment 22: Adverse Facts Available Rate for Norte Pesca

The petitioners argue that the use of total adverse facts available is appropriate with respect to Norte Pesca because it withdrew from the investigation prior to verification. By withdrawing from the investigation, the petitioners contend that Norte Pesca did not act to the best of its ability to comply with the Department's request for information. Therefore, according to the petitioner, the Department should apply the higher of either the initiation (petition) rate or Norte Pesca's preliminary weighted-average margin percentage of 67.80 percent because it can be inferred that the company withdrew

because continued participation would have resulted in the same or higher rate than the preliminary margin of 67.80 percent. The petitioners further argue that the use of adverse facts available in this case is consistent with Department practice and cites Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol from the Republic of Korea, 68 FR 47540 (August 11, 2003), at Comment 1 of the accompanying Issues and Decision Memorandum in support of its position.

The Department's Position

Because Norte Pesca withdrew from the proceeding, the Department must apply facts available, pursuant to section 776(a)(2)(C) and (D) of the Act. Section 776(b) allows the Department to make adverse inferences when selecting from the facts otherwise available if the respondent failed to act to the best of its ability. By withdrawing from the antidumping investigation prior to verification, Norte Pesca failed to act to the best of its ability to cooperate in the investigation and comply with the Department's requests for information. As total adverse facts available under section 776(b) of the Act, we have assigned to Norte Pesca the dumping margin of 67.80 percent, which is the rate we calculated for Norte Pesca in the preliminary determination. For further discussion, see Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from Brazil, signed December 17, 2004, and the Memorandum to Louis Apple, Director, AD/CVD Operations, Office 2, Import Administration from The Team, Final Determination of Certain Frozen and Canned Warmwater Shrimp from Brazil: Use of Facts Available for Norte Pesca, dated December 17, 2004, on file in Room B-099 of the main Commerce Department building.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final determination in the investigation and the final weighted-average dumping margins in the Federal Register.

Agree _____

Disagree _____

James J. Jochum
Assistant Secretary
for Import Administration

(Date)